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October Term, 1969

No. 902

MARY GREEN and EDWIN GREEN, JR.,
as Administrator of the Estate of
EDWIN GREEN, Deceased,

Petitioners,

vs.

THE AMERICAN TOBACCO COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAWRENCE V. HASTINGS
IRMA ROBBINS FEDER
Attorneys for Petitioners
312 Biscayne Building
Miami, Florida 33130

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PETITION FOR A WRIT OF CERTIORARI TO
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Petitioners pray that a writ of certio-

ri issue to review the judgment of the

United States Court of Appeals for the Fifth Circuit en banc entered in the above-entitled cause on April 8, 1969, petition for rehearing having been denied on July 7, 1969.

OPINIONS BELOW*

The initial opinion of the Court of Appeals following the first jury trial herein is reported at 304 F.2d. 70 and appears in Appendix A (App. p. 1a). The opinion of the Court of Appeals granting rehearing and certifying a question to the Florida Supreme Court is reported at 304 F.2d. 85 and appears in Appendix B (App. p. 33a). The Florida Supreme Court's advisory opinion is reported

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* As the opinions below are voluminous, a separate Appendix to Petition accompanies this Petition under this Court's Rule 23 (1)(i). "App." refers to said Appendix and "CT" refers to the Certified Transcript.

at 154 So.2d. 169 and appears in Appendix C (App. p. 36a). The opinion of the Court of Appeals granting appellants a partial new trial is reported at 325 F.2d. 673 and appears in Appendix D (App. p. 44a).

The initial opinion of the Court of Appeals following the second jury trial herein is reported at 391 F.2d. 97 and appears in Appendix G (App. p. 66a). The opinion of the Court of Appeals (rehearing en banc having been granted) is reported at ___ F.2d. ___ and appears in Appendix J (App. p. 110a).

JURISDICTION

The judgment of the Court of Appeals en banc was entered on April 8, 1969, and appears in Appendix L (App. p. 123a). Petition for rehearing was denied on July 7, 1969, (App. K, App. p. 121a) and by Order of Mr.

Justice Black, dated September 16, 1969, the time for filing the written Petition for Writ of Certiorari was extended to and including December 4, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

I.

DOES THE DECISION BELOW IN THE DIVERSITY CASE AT BAR CONFLICT WITH FLORIDA IMPLIED WARRANTY LAW AS SET FORTH BY THE FLORIDA SUPREME COURT?

II.

SHOULD THE COURT OF APPEALS BELOW HAVE CERTIFIED THE ENTIRE CASE AT BAR TO THE FLORIDA SUPREME COURT UNDER THE SPECIAL CIRCUMSTANCES INVOLVED?

III.

DOES THE DECISION BELOW VIOLATE PLAINTIFFS' RIGHT TO A FULL AND FAIR JURY TRIAL UNDER THE SEVENTH AMENDMENT?

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution of the United States states as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

RULE INVOLVED

The Florida certification rule involved is Rule 4.61 of the Florida Appellate Rules (pursuant to Sec. 25.031, Fla. Stat. [1959])

nd states as follows:

"Rule 4.61. CERTIFIED QUESTIONS FROM FEDERAL COURTS

a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this state.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or

motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The

appellant or moving party in the federal court shall file and serve upon its adversary its brief on the questions certified within 30 days after the filing of said certificate in the appellate court of this state having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 20 days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within 10 days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits."

STATEMENT OF THE CASE

Petitioners seek this Court's review of the decision of the Court of Appeals for the Fifth Circuit en banc overruling the majority of the Appellate Court's panel and

affirming judgments for defendant-American Tobacco Company. Since the decision below comes after two jury trials and two sets of appellate proceedings during the past twelve years, this "Statement" does not attempt to note everything that has occurred. The numerous majority and dissenting opinions appearing in the 124 page "Appendix to Petition" contain histories of the litigation involved (see e.g. Judge Coleman's majority opinion of January 24, 1968, 391 F.2d. 97, App. pp. 66a-73a).

In December, 1957, Edwin Green Sr. sued the American Tobacco Company for lung cancer caused by his smoking of defendant's Lucky Strike cigarettes,

alleging inter alia breach of implied warranty of fitness for human consumption. Jurisdiction of the United States District Court for the Southern District of Florida was based on diversity of citizenship. Mr. Green died on February 25, 1958; his Administrator was substituted as plaintiff and his widow brought suit under the Florida wrongful death statute (CT Vol. VII p. 15).

At trial No. 1 the jury found that Edwin Green Sr.'s fatal lung cancer was proximately caused by his smoking of defendant's cigarettes but that defendant could not reasonably have known of the danger at the time his lung cancer was discovered (answers to special interrogatories No. 1-4, CT Vol. VII pp. 37-38, see Rule 49(b), Fed. R. Civil

Proc.) and therefore brought in general verdicts for defendant (CT Vol. VII pp. 35-36).

On Appeal No. 1 the Court of Appeals (Judge Cameron dissenting) initially rejected plaintiffs' claim that they were entitled to judgment on liability as a matter of law since defendant's "knowledge" was irrelevant to liability for breach of implied warranty (304 F.2d. 70, App. p. 1a), and then, on rehearing, certified the knowledge question to the Florida Supreme Court (304 F.2d. 85, App. p. 33a). The Florida Supreme Court's advisory opinion held defendant's "knowledge" irrelevant and explicitly denied that "the wholesomeness of a product should be determined on any standard other than its actual safety for human consumption..." (154 So. 2d. 169, 173, App. pp. 36a, 42a-43a). The

Court of Appeals (Judge Cameron dissenting in part) then reversed the judgments for defendant and remanded for a new trial limited to the sole remaining liability issue of "whether or not the cigarettes were 'reasonably fit and wholesome'" and the issue of damages (325 F.2d. 673, 677, App. pp. 44a, 50a); the Court of Appeals held that defendant could not relitigate the proximate cause finding "already conclusively established" by the jury's answers to Special Interrogatories No. 1, 2 and 3 (325 F.2d. 673, 678, 679, App. pp. 44a, 52a, 53a , emphasis added).

This Court denied defendant's Petition for a Writ of Certiorari and plaintiffs' Cross Petition for a Writ of Certiorari (377 U.S. 943, 84 S. Ct. 1349, 1351, 12 L.ed.2d.

306, App. p. 64a).

At Trial No. 2 plaintiffs' expert evidence on the issue of "reasonable fitness" demonstrated that cigarettes cause about 10% of heavy smokers to die of lung cancer after about twenty years of smoking (see e.g. CT Vols. VII and VIII, pp. 157, 166, 173, 189, 192, 194, 203, 261, 263; 291, 341, 336, 314, 317; 217, 214; 463-464, 472-473, 478, 397; 567, 580, 571; 416-419, 436, 438-439, 446, 448). Defendant's evidence on "reasonable fitness" consisted of expert testimony to the effect that "nobody knows the cause of lung cancer" (see e.g. CT Vol. VIII pp. 649, 651-652, 654-665; 730, 732; 772; 785-786, 791-792, 808-811; 804, 819; 826-827, 831; 913-914; see also App. p. 78a). Following a surprise supplemental charge in effect

directing a verdict for defendant (CT Vol. VIII pp. 994-995), the jury returned such verdict (CT Vol. VIII p. 996).

On Appeal No. 2 plaintiffs challenged (1) the denial of their motions for directed verdict on the issue of liability, (2) the surprise supplemental charge, (3) the admission of defendant's expert testimony that no one knows lung cancer's cause, and (4) certain exclusionary rulings by the trial court.

The Court of Appeals (Judge Simpson dissenting) once again reversed the judgments for defendant (391 F.2d. 97, App. p. 66a). Judge Coleman's majority opinion held that defendant's improper expert testimony required a new trial because it involved relitigation of the issue of proximate

cause contrary to the jury's findings at Trial No. 1 and to the Court of Appeals' then controlling opinion (391 F.2d. 97, App. pp. 78a-83a); moreover, the remand was with directions to enter judgments for plaintiff on the issue of liability since intervening Florida cases rendered it clear that a "rule of absolute or strict liability applies with no 'reasonable' limitation on fitness and wholesomeness for human consumption" (391 F.2d. 97, App. pp. 83a-87a).

Defendant's petition for rehearing en banc was granted by the Court of Appeals (App. p. 107a) with the preference that "unless there is objection by the parties, the case be submitted on briefs without oral argument" (App. p. 108a). Plaintiffs'

"Motion of Appellant Requesting Oral Argument on Rehearing En Banc" (CT Vol. IX, Document 13) yielded no direct ruling but about two months later the Court of Appeals modified its prior order to provide rehearing en banc "on briefs and without oral argument" (App. p. 109a).

The Court of Appeals on rehearing en banc rendered a short per curiam opinion as follows (App. pp. 110a-111a):

> "PER CURIAM: The Court sitting en banc recedes from and overrules the decision of the majority of the panel in this case. Both Parts I and II of the opinion are overruled by the Court. We affirm the judgments of the lower court for the reasons and upon the principles set forth in Judge Simpson's dissent, 391 F.2d. at 106.
>
> AFFIRMED."

Judge Coleman's dissenting opinion, in

which Chief Judge Brown and Judge Godbold join, App. pp. 111a-116a, and Chief Judge Brown's dissenting opinion, in which Judges Coleman and Godbold join, App. pp. 116a-120a, take the dual position that (1) plaintiffs are entitled to judgments on liability as a matter of law and (2) certification to the Florida Supreme Court should be made under the circumstances involved. Judge Coleman's dissenting opinion states as follows (App. p. 112a):

> "[I disagree with the holding of the Court en banc] that he who sells for profit a product which caused the dread disease of cancer and also caused that ultimate of all dreads, death itself, can wiggle out of it by convincing a lay jury in a swearing match among super-scientists that such a product may somehow be reasonably safe for personal consumption by the general public."

Chief Judge Brown's dissenting opinion states as follows (App. pp. 116a, 119a):

> "...charged as we are with the duty to accept, try and pass on diversity cases---we are engaging in the wildest of guesses as to what the law of Florida is, or what the Supreme Court of Florida would say it is.
>
> * * *
>
> "With this court so divided, the minimum that should be done is to certify this now critical question to the Florida Supreme Court, just as was done in effect by the Supreme Court's summary reversal of Kaiser Steel.../ 1968, 391 U.S. 593, 88 S.Ct. 1753, 20 L. ed.2d. 835 /. Florida has the right to determine for its ever increasing millions and for the millions of much coveted perennial visitors whether a product that dooms one in ten to the terrible disease can ever be fit or wholesome, reasonably or otherwise."

Plaintiffs' "Amended Petition for Rehearing and Brief in Support" (CT Vol. IX Document 27) was denied by the Court of

Appeals en banc on July 7, 1969 (App. p. 123a).

REASONS FOR GRANTING THE WRIT*

1. The decision and per curiam opinion below, adopting Judge Simpson's dissent (391 F.2d. at 106, App. p. 87a) verbatim and without elaboration, conflict with Florida implied warranty law as set forth by the Florida Supreme Court in its advisory opinion in the case at bar (154 So. 2d. 169, App. p. 36a) and other opinions of said state court.

First, the opinion below holds that "the Supreme Court of Florida recognized... ['reasonably wholesome or fit'] as the

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* "Reasons" No. 1, 2 and 3 correspond to "Questions Presented" No. 1, 2 and 3 supra.

scope of the implied warranty" in the case at bar (301 F.2d. at 113, App. p. 105a), but the Florida Supreme Court's advisory opinion after Trial No. 1 explicitly stated that the sole question certified to it by the Court of Appeals did "not request a statement of the scope of warranty implied in the circumstances of this case" (154 So.2d. at 170, App. pp. 37a-38a).

Second, the opinion below interprets Florida implied warranty law as precluding a manufacturer's liability where "there was not some defect or adulteration in the product" (391 F.2d. at 111, App. p. 100a), but the Florida Supreme Court's advisory opinion is to the contrary and cites with approval a Wisconsin decision holding that breach of warranty might be found "...

'where injury was caused by a chicken bone in a chicken sandwich...'" (154 So.2d. at 172, fn.11, App. pp. 41a-42a). Also, the opinion below apparently overlooks the evidence of arsenic presented by plaintiffs in the case at bar (CT Vol. I pp. 212-221 and Vol. VII pp. 531, 533-537).

Third, the opinion below relies on the Florida Supreme Court's "approval... [of the remand in the case at bar on Appeal No. 17 for 'trial on issues of fact'" (391 F.2d. at 110, App. p. 98a), but the Florida Supreme Court's advisory opinion specifically stated that the certified question did "not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of

law unmerchantable in Florida..." (154 So. 2d. at 170, App. pp. 37a-38a). Obviously the Florida Supreme Court deemed itself limited to answering the "knowledge question" certified to it by the Court of Appeals on Appeal No. 1 and therefore could not and did not determine whether plaintiffs were entitled to judgment on liability or what factual issues (if any other than damages) remained to be litigated at Trial No. 2.

Fourth, decisions and opinions of the Florida Supreme Court prior to the case at bar establish that Florida imposes absolute and strict liability for breach of implied warranty of fitness for human consumption, see e.g. Blanton v. Cudahy Packing Co., Fla. 1944, 19 So.2d. 313, 314,

Cliett v. Lauderdale Biltmore Corp., Fla. 1949, 39 So.2d. 476, Sencer v. Carl's Markets, Fla. 1950, 45 So.2d. 671, 673, Miami Coca Cola Bottling Co. v. Todd, Fla. 1958, 101 So.2d. 34, 35, cf. Carter v. Hector Supply Co., Fla. 1961, 128 So.2d. 390, 392.

Fifth, two cases discussed in Judge Coleman's initial majority opinion on Appeal No. 2 (391 F.2d. 97, App. pp. 73a, 84a, 88a) are McLeod v. W. S. Merrell Company, Division of Richardson-Merrell, Inc., 1965, 174 So.2d. 736, 739, in which the Florida Supreme Court summarized the Green case at bar as one "which applied a rule of absolute or strict liability..." and Foley v. Weaver Drugs, Inc., 1965, 177 So.2d. 221, 229, in which the Florida

Supreme Court once again referred to "the absolute liability imposed upon the manufacturer.../for breach/ of an implied warranty of fitness and wholesomeness..." As stated by Judge Coleman (App. p. 86a), neither case "anywhere modified or limited the requirement of fitness or wholesomeness to 'reasonable fitness' or 'reasonable wholesomeness'" with respect to products for human consumption or use.

Judge Coleman's dissenting opinion below (App. pp. 111a-116a) cogently demonstrates why Florida implied warranty law could not permit the result reached by the majority below:

> "The one inescapable consideration is that a jury found as a fact that Mr. Edwin Green, Sr. died of primary cancer of the lung, caused from smoking Lucky Strike cigarettes.

> This finding was affirmed by this Court [5th Cir.], 304 F.2d. 70 (1962); 325 F.2d. 673 (1963). The decisive point is that when a jury so found there simply remained no further strict liability factual issue in the case...
>
> (App. p. 111a)
>
> "As to cancer-causing cigarettes, one must ask, how can anything, as a matter of fact, be reasonably fit for use by the general public when it is known to kill and no one knows whom it will kill?"
>
> (App. p. 113a).

2. Petitioners contend that the Court below should have certified the entire case at bar to the Florida Supreme Court under the special circumstances involved. The five majority opinions of the Court of Appeals in this case to date have been accompanied by five dissenting opinions to date. Although it seems clear to petitioners, to Chief Judge Brown and to Judges

Coleman and Godbold of the court below that plaintiffs are now entitled to judgments on liability as a matter of Florida implied warranty law, the majority of the court below en banc disagrees (App. pp. 110a-120a).

Florida's certification procedure specifically applies to cases in "Courts of Appeal of the United States" involving determinative state law questions when "there are no clear controlling precedents in the decisions of the [Florida] Supreme Court ..." (Florida Appellate Rules, Rule 4.61, "Rule Involved", supra; see also Fla. Stat. [1959], Sec. 25.031). As stated in Chief Judge Brown's dissenting opinion (App. p. 116a), the court below should not continue its "failure to use properly and exploit fully the remarkable tool of certification

to the Supreme Court of Florida."

On prior certification during Appeal No. 1 the Florida Supreme Court considered itself restricted to the four corners of the "knowledge question" certified to it by the Court of Appeals (154 So.2d. at 170, App. pp. 37a-38a). In subsequent cases the Court of Appeals rendered it clear to the Florida Supreme Court that particular certified questions "do not...foreclose the Supreme Court of Florida from deciding upon consideration of the allegations and facts in the record" (Hopkins v. Lockheed Aircraft Corp., 5th Cir. 1966, 358 F.2d. 347, 349) and that in order to avoid "the failure of the [certification] procedure" in the Green case at bar, the Florida Supreme Court's "widest possible latitude

in reaching decision.... extends to re-statement of the issue or issues and the manner in which the answers are to be given" upon the state court's analysis of the record involved (Martinez v. Rodriguez, 5th Cir. 1968, 394 F.2d. 156, fn. 2 at 157, fn. 6 at 159, after certification, 1969, 410 F.2d. 729). Thus, however the certified question be phrased were full certification to take place now, the Florida Supreme Court could determine (1) whether or not the cigarettes which caused Green Sr.'s fatal lung cancer were unmerchantable as a matter of law, and (2) whether or not plaintiffs are entitled to judgments on liability under Florida implied warranty law upon the trial records herein.

The decision of the court below manages to "write 'FINIS' to this long and

troublesome litigation" (391 F.2d. at 113, App. p. 106a) without ever giving the Florida Supreme Court (many of whose present members joined said court after prior certification herein) an opportunity for full review upon full certification. Such decision places an unnecessarily heavy burden on the "delicate balance in the area of federal-state relationships" (Zwicker v. Koota, 1967, 389 U.S. 241, 88 S.Ct. 391, 19 L.ed.2d. 444, concurring opinion of Mr. Justice Harlan, 389 U.S. at 399).

Since "Federal courts do not make the law with reference to state questions but merely ascertain and apply it" in diversity cases such as the one at bar (391 F.2d. 97, App. p. 115a) and since the implied warranty issue concerning cancer-

causing-cigarettes "which is crucial in this case is one of vital concern" to Florida and "is a truly novel one" (Kaiser Steel Corp. v. W. S. Ranch Co., 1968, 391 U.S. 593, 594, 88 S.Ct. 1753, 20 L.ed.2d. 835), certification is called for.

The case at bar seems to present more than sufficient "special circumstances" requiring invocation of the abstention doctrine (Kaiser Steel Corp. case, supra, U.S. at 595, S.Ct. at 1755, concurring opinion of Mr. Justice Brennan in which Mr. Justices Douglas and Marshall join). Chief Judge Brown's dissenting opinion below sets forth the special circumstances as well as the applicable law concerning abstention and certification (App. pp. 116a-120a); his conclusion

follows:

> "We know one thing for sure: no one knows just what the Supreme Court of Florida would say about the wholesomeness of a product that in one out of ten users brings about the dreaded cancer. Of course, Florida has a great stake in fashioning the products liability standards as a sanction to a strong judicial policy of protecting Floridians from the consequences of products of such portent.
>
> (App. pp. 118a-119a)
>
> "...the question is so vital to Florida that the state should be given the opportunity to fashion its own policy standard through the available, workable mechanism of certification."
>
> (App. p. 120a)

According to Judge Rives' majority opinion for the court below in the case at bar following prior certification during Appeal No. 1, the Florida Supreme Court's answer to the certified question at that time "saved this Court, through the writer

as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice" (325 F.2d. 673, App. pp. 44a-45a).

Petitioners unsuccessfully requested the court below to certify the entire case to the Florida Supreme Court following its latest en banc decision of affirmance overruling its panel below (see "Motion of Appellant for Certification to the Supreme Court of Florida" and "Amended Petition for Rehearing and Brief in Support", CT Vol. IX Documents 18, 19 and 27). At this posture of the case at bar, only this Court can prevent the probably "grave miscarriage of justice" which will occur if the Florida Supreme Court cannot once and for all determine applicable state implied warranty

law herein.

3. Petitioners take the position that the decision and opinion below violate their right to a full and fair jury trial as guaranteed by the Seventh Amendment to the Constitution of the United States for several reasons.

First, defendant's expert evidence at Trial No. 2 on the issue of reasonable fitness, expert evidence to the effect that "nobody knows the cause of lung cancer", was not only contrary to the jury's finding of fact in answer to special interrogatories at Trial No. 1 that defendant's cigarettes proximately caused Green Sr.'s fatal lung cancer, but also violated the Court of Appeals' holding that such finding of fact was binding on all parties at

Trial No. 2 and could not be relitigated (325 F.2d. at 678, and 679, App. pp. 52a, 53a, 55a). As discussed in Judge Coleman's initial majority opinion on Appeal No. 2 (391 F.2d. 97, App. pp. 78a-83a), when the jury at Trial No. 2 was informed of the "binding finding" of the prior jury that defendant's cigarettes caused Green Sr.'s fatal lung cancer and was then presented with defendant's nobody-knows-cancer's-cause expert testimony, the jury was "required to return verdicts on choices between mutually impossible propositions" (App. p. 82a).

Second, the trial court's surprise supplemental charge to the jury in effect directed verdicts for defendant by requiring cigarettes to endanger an "important",

"responsible" and "large" portion of smokers and the general public (CT Vol. VIII pp. 994-995). It is self-evident that reasonable men might well consider ten percent not an important, responsible, large portion of smokers (leastwise the proportionately smaller percent of the general public involved), but the Court of Appeals' then-controlling decision specifically held that plaintiffs' "10% evidence" (if not a smaller percent) presented a jury question, permitted a jury verdict for plaintiffs, and prohibited a directed verdict for defendant (325 F.2d. at 676-677, App. pp. 49a-50a). Moreover, as stated in Frumer and Friedman's Products Liability in Sec. 16.03(4)(a), fn. 14.5h at pp. 3-64 and 3-65, the "test of numbers

in the allergy cases" should not have been applied in the case at bar since there was no indication "that persons who develop lung cancer from smoking are abnormal."

Third, the trial court made several broad evidentiary rulings excluding evidence of animal expermentation (see e.g. CT Vols. VII and VIII, pp. 229, 234, 241, 248, 306, 312, 469, 547-548, 910), testimony referring to the famous "Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service" and other recognized scientific authorities (see e.g. CT Vols. VII and VIII, pp. 70, 454-463, 67-74, 763, 885-886), and testimony not dealing with scientific fact or opinion exclusively within and based on the expert's own personal knowledge

and experience (see e.g. CT Vols. VII and VIII, pp. 73, 157, 160-167, 169-170, 174-175, 177-178, 189-195, 201-202, 214-218, 224-226, 266-267, 408-410, 429, 456, 460-463, 471, 475-476, 552-553, 555-557, 563, 566, 572-574, 590-591, 670-671, 722-723, 775-776, 799, 800-802, 804-807, 808-809, 832, 870, 885-886, 899, 929). The trial court's exclusionary rulings made it extremely difficult for plaintiffs to present anything other than statistical proof concerning the number of cigarette smokers contracting lung cancer and the risk involved.

Fourth, the decision below relies in part on the fact that "defendant...has twice won this case before a jury" (391 F.2d. 97, 107, App. p. 90a). Such reliance violates the Seventh Amendment's guarantee

of a full and fair jury trial free from reversible error since both the Court of Appeals and the Florida Supreme Court deemed Trial No. 1 tainted by harmful error (325 F.2d. 673, App. p. 44a; 154 So. 2d. 169, App. p. 36a). It should also be noted that several Judges of the Court of Appeals below deem Trial No. 2 equally tainted by reversible error (391 F.2d. 97, App. p. 66a; App. pp. 111a, 116a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

By_____

IRMA ROBBINS FEDER
and
LAWRENCE V. HASTINGS
312 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing Petition for Writ of Certiorari and separate Appendix to Petition were served on Respondent by mailing a copy thereof in a duly addressed envelope to A. LEE BARDFORD, ESQ., Dixon, Bradford, Williams, McKay & Kimbrell, 101 E. Flagler St., Miami, Florida 33131, and to E. R. NEAHER, ESQ., Chadbourne, Park, Whiteside & Wolff, 25 Broadway, New York, N. Y. 10004, Counsel for Respondent, this 2nd day of December, 1969.

Irma Robbins Feder

SUPREME COURT U. S.

FILED

DEC 3 1969

JOHN F. DAVIS, CLERK

in the Supreme Court of the United States

October Term, 1969

No. 908

MARY GREEN and EDWIN GREEN, JR.,
as Administrator of the Estate of
EDWIN GREEN, Deceased,

Petitioners,

vs.

THE AMERICAN TOBACCO COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION

LAWRENCE V. HASTINGS
IRMA ROBBINS FEDER
312 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioners

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Lawrence V. Hastings
Irma Robbins Feder
312 Biscayne Building
Miami, Florida 33130

Attorneys for Petitioners

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19003

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(May 2, 1962)

Before RIVES, CAMERON and BELL, *Circuit Judges.*

RIVES, *Circuit Judge*: Edwin Green, *Sr.*, brought suit against American Tobacco Company in December 1957, claiming that he had incurred lung cancer as a result of smoking defendant's product, Lucky Strike cigarettes. A few months later, on February 25, 1958, Mr. Green died. Under the Florida Survival Statute,[1] the claim survived, and Mr. Green's son, Edwin Green, Jr., appointed administrator of his estate, was substituted as plaintiff.[2] The widow, Mary Green, also filed suit under the Florida Wrongful

[1] Section 45.11, Florida Statutes 1959.

[2] Rule 25 (a), Federal Rules of Civil Procedure.

Death Statute.[3] The two suits were consolidated by order of the district court, and came on for jury trial upon an amended complaint which asserted in separate counts six theories of liability: (1) Breach of Implied Warranty; (2) Breach of Express Warranty; (3) Negligence; (4) Misrepresentation; (5) Battery; and (6) Violation of the Federal Food, Drug and Cosmetic Act, the Federal Trade Commission Act, and the Florida Food, Drug and Cosmetic Act.

At the close of the plaintiffs' evidence, in a ruling not questioned on appeal, the district court sustained the defendant's motion for a directed verdict on all counts except Count 1, breach of implied warranty, and Count 3, negligence. At the close of all the evidence, the defendant renewed its motion for directed verdict on those two counts. The court reserved its ruling on that motion, and submitted the cases to the jury upon the two theories of liability, breach of implied warranty and negligence. The jury returned general verdict for the defendant, and answered written interrogatories submitted under Rule 49(b), Federal Rules of Civil Procedure, as follows:

"(1) Did the decedent Green have primary cancer in his left lung?

"Yes.....X.....

"No.....

"If your answer is 'Yes,' then

"(2) Was the cancer in his left lung the cause or one of the causes of his death?

"Yes.....X.....

"No.....

"If your answer to the above question is 'Yes,' then

[3] Sections 768.01, 768.02, Florida Statutes 1959.

"(3) Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung?

"Yes.....X.....

"No.....

"If your answer to the above question is 'Yes,' then

"(4) Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known the users of Lucky Strike cigarettes, such as the decedent Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung?

"Yes.....

"No.....X....."

Upon the jury's verdict, judgment in each case was entered for the defendant. A cost judgment against the plaintiffs was entered in the amount of $1,969.74, which included $900.00 for expert witness fees assessed at the rate of $100.00 each.

Upon appeal, the plaintiffs present no questions as to the rulings on Count 3, negligence, but restrict their contentions to the theory of Count 1, implied warranty. As stated in their brief:

"Three questions only are presented by these appeals:

"(1) Under the Florida doctrine of implied warranty are not the plaintiffs entitled to judgment as a

matter of law, as requested in their post-trial motions under Rule 49(b), based upon the jury's special findings that the smoking of defendant's Lucky Strike cigarettes proximately caused the plaintiffs' decedent to contract a fatal case of cancer of the lung?

"(2) Did not the trial Judge err in refusing to grant plaintiffs' requested charges on the issue of implied warranty and in charging instead that the implied warranty of fitness which a manufacturer under Florida law is held to make depends upon the ability of the manufacturer to know about the harmful substances in its product?

"(3) Did not the trial Judge err in taxing as costs against the plaintiffs a total of nine expert witness fees in the amount of $100.00 per expert, such sums being beyond the amount allowable and authorized by Federal statute?"

Edwin Green, Sr., began smoking Lucky Strike cigarettes in 1924 or 1925 when he was about 16 years old. He smoked from one to three packages per day until early 1956, when his physician advised him that he had contracted cancer of the left lung. By the time of diagnosis the cancer was no longer operable or curable. Ameliorating treatment was given, but the cancer proceeded on its typical, fatal course, and resulted in Mr. Green's death on February 25, 1958.

The testimony at the trial was concerned principally with the issues of whether Mr. Green's death was caused by a cancer originating in the lung, that is, primary lung cancer, and whether that cancer was caused by his smoking of Lucky Strike cigarettes. Eight eminent medical doctors testified on each side. They were in sharp disagreement. The district court properly submitted to the jury the questions

of medical causation.[4] Their testimony was also in conflict on whether by February 1, 1956, when it was first discovered that Mr. Green had lung cancer, scientific knowledge had progressed to such an extent that the defendant could, by reasonable foresight, have learned that the smoking of cigarettes was a probable cause of lung cancer.

Plaintiff-appellants state their main insistence as follows:

> "The fundamental point upon which the plaintiffs rely on this appeal is that the Trial Court erred, as a matter of law, in ruling that the implied warranty of fitness which a manufacturer of products for human consumption is held by Florida law to make does not cover deleterious substances in its products, the harmful effects of which are unknown to the manufacturer and could not have been known by any developed human skill or foresight. Plaintiffs contend that the knowledge of the manufacturer is irrelevant and immaterial to the manufacturer's liability on an implied warranty under Florida law, and that a manufacturer's implied warranty is not limited to harmful substances of which the manufacturer either had knowledge, or should have had knowledge, or could have had knowledge according to developed human skill and foresight."

With that insistence we cannot agree. To the contrary, we are convinced that the doctrine of implied warranty by a manufacturer and seller of the qualities and fitness of the thing sold for the purpose for which it is intended or desired is founded on his superior opportunity to gain knowledge of the product and to form a judgment of its fitness.

---

[4] *Montgomery* v. *Stary*, Fla. 1955, 84 So. 2d 34, 39; *Metzel* v. *Robinson*, Fla. 1958, 102 So. 2d 385, 386; see *Great American Indemnity Co.* v. *Holloway*, 5 Cir., 1960, 286 F. 2d 106, 108-109.

That principle can clearly be deduced from all of the Florida cases on implied warranty whether by the manufacturer or by the dealer.

In the comparatively early case of *Berger* v. *E. Berger & Co.*, Fla. 1918, 80 So. 296, a dealer was held liable on an implied warranty that a lot of lumber was fit for the purposes for which the dealer knew that it was purchased. The court quoted at some length a passage from Benjamin on Sales (5th ed.) 595, beginning with the sentence: "An implied warranty, or as it is called, a covenant in law as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason." 80 So. at 299. The court concluded:

> "We think the rule is well established which embodies the principle above quoted that where a person contracts to supply an article in which he deals for a particular purpose, knowing the purpose for which he supplies it and that the purchaser has no opportunity to inspect the article, but relies upon the judgment of the seller, there is an implied condition or 'warranty,' as it is called, that the article is fit for the purpose to which it is to be applied."

In *Smith* v. *Burdine's Inc.*, Fla. 1940, 198 So. 223, 227, 229, a buyer requested of a saleslady at a cosmetic counter a good lipstick. The saleslady selected a certain lipstick and recommended it for its intended use. The lipstick contained a poisonous substance which allegedly injured the health of the buyer. In an action for breach of implied warranty of fitness the trial court directed a verdict for the defendant. The Florida Supreme Court reversed and held that whether the buyer relied on the judgment of the saleslady was for the jury, saying:

"The existence or non existence of an implied warranty of fitness for a particular purpose must and necessarily does depend upon whether or not the buyer relied upon his own judgment at the time of the purchase or relied on the skill or judgment of the seller, and this is a question of fact to be determined by a jury under appropriate instructions." (198 So. 229.)

In *Blanton* v. *Cudahy Packing Co.*, Fla. 1944, 19 So. 2d 313, a manufacturer or canner of a meat product, known as "Tang," sold to the retailer in sealed packages or cans was held liable to the ultimate consumer for breach of an implied warranty that such product is wholesome and fit for human consumption. The court said in part:

"The implied warranty theory of liability comports with the general trend of the best reasoned cases. The manufacturer knows the content and quality of the food products canned and offered to the public for consumption. The public generally is vitally concerned in wholesome food, or its health will be jeopardized. If poisonous, unhealthful and deleterious foods are placed by the manufacturer upon the market and injuries occur by the consumption thereof then the law should supply the injured person an adequate and speedy remedy. It is our conclusion that the implied warranty remedy of enforcement will accomplish the desired end." (19 So. 2d at 316.)

In *Cliett* v. *Lauderdale Biltmore Corporation*, Fla. 1949, 39 So. 2d 476, a guest sued the proprietor of a hotel dining room, claiming that he had become ill as the result of eating impure or unwholesome food. The action was based "on the theory of an implied warranty that the food was fit for human consumption." (39 So. 2d 476.) The trial court sustained a demurrer to the complaint. The Florida Su-

preme Court reversed. In the course of its opinion, it quoted from *Cushing* v. *Rodman*, 65 App. Div. D. C., 82 F. 2d 864, 868, a passage beginning: "'The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor. . . .'" Continuing, the Supreme Court of Florida said:

> "Indeed, it would seem that if any distinction were to be drawn between the retailer and the restaurant keeper in such a transaction, the duty of the latter should be greater than that of the retailer who in many instances has no better opportunity for knowledge of the fact that certain foods may contain deleterious substances than has the ultimate consumer who purchases the article. For in a sense the restaurant keeper is the direct manufacturer of the meals he prepares in his own kitchen and serves to his guests in his dining room. It is hardly possible to think of any dishes prepared by him wherein his opportunity for knowledge of the ingredients is not far greater than that of the customer, hence he is in a position largely, if not entirely, denied to the guest to judge of their fitness before he serves them. As between the paying guest, who has no real means of determining whether the meal served is fit for human consumption, and the restaurateur, who is in a position to determine this fact before and during the period of preparation, the burden should properly rest with the one who has or should have such facilities to keep the food pure and fresh as to make an injury to the customer from their use highly improbable if not possible." (39 So. 2d at 478.)

In *Lambert* v. *Sistrunk*, Fla. 1952, 58 So. 2d 434, 435, the Florida Supreme Court held that there was no implied

warranty arising from statements by defendant's salesmen that a stepladder was strong and would last a lifetime and that plaintiff would never break it. In part the Supreme Court of Florida said:

> "It has been said that the concept of implied warranty rests upon the foundation of business ethics and constitutes an exception to the maxim 'let the buyer beware,' itself encompassing the idea that there is no warranty implied with respect to the quality of the goods being sold. To come into play, the exception must therefore spring from some moral obligation on the part of the seller, or perhaps more accurately, on the breach of some such duty amounting to fraud or the taking advantage of the buyer by reason of some superior knowledge in the seller, or the reliance by the buyer on the seller's judgment.
>
> * * * * *
>
> "There is no need to dwell on the class of cases where the buyer relies upon the seller's judgment of the fitness of a particular article for the purpose intended, because the use of a stepladder is as well known to a buyer as to a seller and is as limited as it is well known. This feature is common to the lipstick involved in Smith v. Burdine's, Inc., supra [Fla. 1940, 198 So. 223]. The difference, as we have already observed, is in the nature of the articles sold. One cannot know the ingredients of a lipstick without chemical analysis. One can know as much as a salesman of a stepladder by simply looking at it. And this lack of opportunity to inspect was also a factor in the case of Blanton v. Cudahy Packing Co., supra [Fla. 1944, 19 So. 2d 313]."

See also *Florida Coca Cola Bottling Co.* v. *Jordan*, Fla. 1953, 62 So. 2d 910; *Hoskins* v. *Jackson Grain Co.*, Fla. 1953,

63 So. 2d 514; *Food Fair Stores of Florida* v. *Macurda*, Fla. 1957, 93 So. 2d 860; and *Miami Coca Cola Bottling Co.* v. *Todd*, Fla. 1958, 101 So. 2d 34.

The appellants rely most strongly upon two very recent cases decided by the Supreme Court of Florida. *Sencer* v. *Carl's Markets*, Fla. 1950, 45 So. 2d 671, and *Carter* v. *Hector Supply Co.*, Fla. 1961, 128 So. 2d 390. In *Sencer* v. *Carl's Markets, supra*, it was held that a retail dealer in food products sold in sealed packages or cans is liable to the consumer on the theory of implied warranty for injuries sustained because of a deleterious, unwholesome or unfit substance for human consumption appearing in the sealed package or can. The trial court had sustained demurrer to the plaintiff's complaint. The Supreme Court of Florida reversed, two justices dissenting, two concurring specially, and three concurring in an opinion in effect approving the argument of counsel for appellants stated as follows:

> "Counsel for appellants point out that the duty to offer and sell wholesome food in sealed cans and packages to the consuming public should rest alike on the manufacturer and retailer because the retailer is experienced in buying from the manufacturers; he is acquainted with the products and the manufacturers; he relies upon representations made to him. The public is vitally concerned in wholesome food or its health will be jeopardized and a legal distinction as to liability as between the manufacturer and retailer should not exist." (45 So. 2d 673.)

Justice Hobson concurring specially, in an opinion in which he was joined by Justice Terrell, stated:

> "Furthermore, I am of the opinion that the retailer who is sued and against whom judgment might be secured, should, in turn, be allowed to sue the man-

ufacturer, which is the reason for my disagreement with the views expressed by Associate Justice Tillman. I do not follow his thought that holding a retail grocer liable in a case of this character would result in bankrupting the individual independent grocer. The retail merchant can avoid placing himself in a position wherein he could not, in turn, sue the manufacturer by electing to purchase only from responsible manufacturers within the jurisdiction of the courts in which he might enter suit." (45 So. 2d 673.)

Thus, the implied warranty by the retailer was sustained not only because of the retailer's better position in selecting and dealing with the manufacturer, but because the retailer had a right of indemnity over against the manufacturer.

In *Carter* v. *Hector Supply Co., supra,* the action was by an injured employee of a purchaser of a riding sulky against the retailer. The Florida Supreme Court held that the employee could not impose liability on the retailer on the basis of implied warranty because of absence of privity of contract. That point is not important here because in this litigation no privity defense was raised.

In the course of its opinion, however, the Florida Supreme Court did say that the employee "relied entirely on an alleged implied warranty in order to impose absolute liability regardless of fault on the retailer with relation to whom there was no privity." Further in the course of its opinion, the Florida Supreme Court disagreed with the holding of the District Court of Appeal (122 So. 2d 22) to the effect that proof of actual or implied knowledge of the defect on the part of the retailer is essential to his liability on an implied warranty. The Supreme Court of Florida said:

"The ultimate holding of the court of appeal is to the effect that proof of actual or implied knowledge of

a defect on the part of a retailer is essential to his liability on an implied warranty in an action brought by one other than the purchaser. The court of appeal relied upon Lambert v. Sistrunk, Fla. 1952, 58 So. 2d 434. Here again we think its confidence was misplaced for the simple reason that Lambert involved a direct purchaser-seller situation in which the purchaser had an opportunity equal to that of the seller to inspect the item purchased. It did not involve a third party effort to impose implied warranty responsibility on a retailer.

"The instant holding of the court of appeal, however, is essentially correct in finding that a retailer could be held liable to a third party in a *negligence action* as contrasted to absolute liability under an *implied warranty* only if the retailer could be charged with actual or implied knowledge of the defect. Again we emphasize that in the case at bar Carter relied entirely on an alleged implied warranty in order to impose absolute liability regardless of fault on the retailer with relation to whom there was no privity. Finding as we do that the lack of privity between these parties precluded the implication of a warranty, the plaintiff would necessarily be relegated to an action in tort for negligence. Actually this, in effect, is where the ultimate judgment of the court of appeal placed him. In that event, in the type of situation immediately before us, it would be necessary for him to prove that the retailer knew, or should have known, of the defective condition of the commodity. To this extent the court of appeal ruled correctly in holding that proof of this element would support a finding of fault on the part of the retailer. This is in direct contrast with the rule that such proof is wholly unnecessary in an implied warranty situation." (128 So. 2d 392.)

The actual holding of the court was thus expressed:

> "The sum of our holding here simply is that one who is not in privity with a retailer has no action against him for breach of an implied warranty, except in situations involving foodstuffs or perhaps dangerous instrumentalities, a problem not presently here." (128 So. 2d 393.)

If the language in *Carter* v. *Hector Supply Co., supra,* relied on by appellants, is anything more than dictum, it does not go so far as to sustain the appellants' position in the present case. It does not say that it is immaterial that the manufacturer could not have known, or had no opportunity to gain knowledge, or to form a judgment as to the dangerous qualities of the product manufactured and sold.

We think, therefore, that the jury's general verdicts for the defendant are sustained by its negative answer to special interrogatory No. 4.

> "No. 4. Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung?"

The defendant could not be held liable as an absolute insurer against consequences of which no developed human skill and foresight could afford knowledge. The district court did not err in charging the jury that,

> "... The manufacturer of products which are offered for sale to the public in their original package for human consumption or use impliedly warrants that its products are reasonably wholesome or fit for the pur-

pose for which they are sold, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge."

Founded on the presumed intention of the parties and upon reason is the doctrine that the existence or non-existence of an implied warranty of fitness for a particular purpose depends upon whether or not the buyer, at the time of the purchase, relies on the skill and judgment of the seller. The buyer is presumed so to rely only when the seller is thought to have a superior opportunity to exercise such skill, or to gain knowledge of the product or of its source, and hence to form a better judgment of its fitness. The common sense of that doctrine may be appreciated by foreseeing its probable application to three different classes of products intended for human consumption: (1) those believed by all to be wholesome, for example, most foods; (2) those known by all to be injurious to some while perhaps beneficial or pleasurable to others, for example, alcoholic beverages; (3) those heretofore thought by all to be wholesome or tolerable, but which constantly expanding scientific research, thought and knowledge have now proved, or at least convinced many, to be injurious, such as cigarettes in the smoke of which appear polycyclic aromatic hydrocarbons and minute quantities of arsenic, and eggs, milk and butter with their high cholesterol content—and what the future may develop the most vivid imagination cannot foretell. Applying that doctrine, as we have stated it, to (1), no absolute liability is imposed upon the seller unless the product contains some foreign substance, is spoiled, or differs in some way from the product it is represented to be. As to (2), the same exceptions obtain; otherwise, the buyer knows as much about the article as the seller, and relies upon his own judgment rather than

that of the seller. As to (3), that doctrine leaves as a question of fact to be determined by the jury under appropriate instructions whether the seller, in the estimation of the parties, had a superior opportunity to gain knowledge of the product or its source, and, hence, whether the buyer, at the time of purchase, relied on the judgment of the seller. It is that doctrine, thus founded upon reason and on the presumed intention of the parties, which, we think, is clearly to be deduced from all of the Florida cases.

Under the present statute, 28 U.S.C.A. §1821, the district court had no authority to tax costs for compensation to an expert witness in excess of the statutory attendance per day, mileage and subsistence allowance.[5] The cost judgment is therefore reversed for entry by the district court of a judgment in accordance with this opinion. The judgments for the defendants are affirmed. Costs of appeal are taxed against the appellants.

CAMERON, *Circuit Judge*, Dissenting:

The jury in this case found that Edwin Green, Sr., age 49, died of primary cancer of the lung, which was proximately contributed to by his smoking of Lucky Strike Cigarettes, produced for human consumption by appellee American Tobacco Company.[1] Having thus found, the jury rejected the appellants' claim for Green's death, because

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[5] *Henkel* v. *Chicago, St. P. M. & O. Ry. Co.*, 1932, 284 U. S. 444; *Department of Highways* v. *McWilliams Dredging Co.*, W. D. La., 1950, 10 F. R. D. 107, aff'd 5 Cir., 1951, 187 F. 2d 61; *Cheatham Electric S. D. Co.* v. *Transit Development Co.*, 2 Cir., 1919, 261 Fed. 792, 796; *Firtag* v. *Gendleman*, Dist. Ct. D. C., 1957, 152 F. Supp. 226; *Commerce Oil Refining Corporation* v. *Miner*, Dist. Ct. R. I., 198 F. Supp. 895, 897-898. 6 Moore's Federal Practice. §54.77 (5), p. 1367.

[1] It is not contended that there was lack of privity between American and Green.

the trial court required that they must find that the injurious substance so established to have been in the cigarettes and its harmful effects would have been revealed to American "by the reasonable application of human skill and foresight." This limitation on the jury was in effect the equivalent of a charge that the exercise of reasonable care on the part of American would exonerate it from liability. I think the charge was clearly erroneous.

This appeal is predicated solely on the theory that American breached its implied warranty to Green. I do not think that one who warrants wholesomeness can escape liability by showing that it exercised reasonable care in its efforts to achieve it. Such an idea is, in my opinion, a refutation of the whole concept of warranty. Because I do not believe that the inclusion of this limitation upon American's duty under implied warranty was justified, I am unable to join in the majority opinion affirming the action of the court below.

This Court recently[2] delineated the general nature of implied warranty:

> "For the purpose of this appeal, the defendants apparently concede that the evidence is sufficient to sustain the findings of the jury that the plaintiff ingested the crab shell at Arnaud's and that it caused his injury. In our view there was ample evidence before the jury to justify these findings. It is contended, however, that the court *erred in trying the case on the theory of implied warranty* and in holding that plaintiff was not required to prove that Arnaud's was guilty of negligence, either actually or by the application of the doctrine of res ipsa loquitur. [P. 885] . . .

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[2] *Arnaud's Restaurant, Inc. et al.* v. *Cotter*, 1954, 212 F. 2d 883, certiorari denied, 348 U. S. 915.

"The primary question for determination is whether under the decisions and law of Louisiana the proprietor of a public eating place *who serves a food fabricated* by him and containing a foreign substance . . . *is under an absolute liability for damages* proximately resulting from the impurity under the theory of *an implied warranty of fitness.* Our review of the authorities convinces us that such is the law of Louisiana. Consequently, the trial court correctly enforced and applied this principle in the trial of the present case.

"This rule of liability was first announced in Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906, 907, 40 L.R.A., N.S. 480, where the Supreme Court of Louisiana held that the seller of food at a public eating place is *conclusively presumed to know any unwholesome condition of the food and is answerable in damages to a purchaser who is made ill because of the unwholesomeness.* The basis of this holding was said to be that:

"'. . . every one ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft, or business of which he makes public profession, and that *lack of such knowledge is imputed to him as a fault,* which makes him liable to the purchasers of his fabrications for the damage resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of.'

* * *

"While the Court was there [LeBlanc v. Louisiana Coca-Cola Bottling Co., 60 So. 2d 873] dealing with a manufacturer's liability for injuries caused by the consumption of deleterious ingredients contained in a bottled beverage, it carefully pointed out that under

Louisiana jurisprudence *a plaintiff in such a case is entitled to rely upon the manufacturer's implied warranty that its product is safe for human consumption.*" [Emphasis supplied.]

While we were dealing in Arnaud's case with the presence of a foreign object, that was not the determinant fact; we placed great reliance upon and quoted from the *Doyle* case from the Supreme Court of Louisiana, where the consumer had been made sick by eating food purchased from the seller with respect to which the seller made uncontradicted proof of the exercise of the highest degree of care in its preparation. Nevertheless, the Supreme Court of Louisiana held that the seller was "at fault if these articles proved to be vitiated and deleterious."

The law there applied was the law of Louisiana, while here we are sitting as a Florida court and applying Florida's law. The quoted language is of some importance for the reason that the Supreme Court of Florida, in a case which it described as presenting a question of first impression, referred to the *Doyle* case, supra, as one of the authorities it relied upon in fashioning the Florida rule governing the doctrine of implied warranty. In *Cliett* the Florida court stated:

"The sole question for determination on the pleading is *whether the proprietor of a public restaurant or dining room who serves a meal containing unwholesome food* to a paying guest for immediate consumption on the premises *is under an absolute liability for the damages proximately resulting from the impurities, on the theory of an implied warranty* of fitness . . .

---

[3] *Cliett* v. *Lauderdale Biltmore Corp.*, 1949, 39 So. 2d 476, 477.

"Some courts have held that in the absence of statute a victualer serving food for immediate consumption on the premises may not be held liable for food deleterious to health, without proof that he was guilty of negligence; while others have determined that aside from any question of negligence such a purveyor of foods for a valuable consideration *is under an absolute liability for unwholesome food served by him, on the theory of an implied warranty of fitness.* . . .

"In our opinion the implied warranty theory of liability comports with the general trend of the better reasoned cases and is supported, on principle at least, by decisions from our own jurisdiction . . .

"These cases establish the principle that as to items of *food or other products* in the original package which are offered for sale for human *consumption or use generally,* a person who purchases such items in reliance upon the express or implied condition or assurance that they are wholesome and fit for the uses or purposes for which they are advertised or sold, and who is injured as the result of *unwholesome or deleterious substances* therein which are unknown to the buyer, may hold either the manufacturer or the retailer liable in damages for injuries sustained by him, on the theory of an *implied warranty of wholesomeness or fitness* of such article or product for the purposes for which it was offered to the public." [Emphasis added.]

In *Sencer et al.* v. *Carl's Markets, Inc.,* 1950, 45 So. 2d 671, the Florida Supreme Court, en banc, was considering the claim against the dealer, not the manufacturer, of persons made sick by eating sardines from a can from which they were served to the consumers. It held that both the manufacturer and the dealer were liable if unwholesome food were offered to the consuming public, quoting from Vol. 1, Williston on Sales, Rev. Ed., page 635:

"'*The imposition of absolute liability* upon a dealer who sells canned goods of reputable manufacture has been denied in a few decisions on the ground that the seller cannot possibly discover that a particular can is defective, and that it is, therefore, unjust to subject him to liability. The same argument, however, may be made in regard to any implied warranty, not only of food *or other articles, where* the buyer must have been aware that the seller could *not discover a defect if it existed.* Accordingly, if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised and placed on another basis.

"'But the general principle of the common law is opposed to this, and certainly if a dealer is ever to be made liable for injuries caused by defective goods *where he has been guilty of no fault,* the reasons are stronger for holding him liable for selling defective food than in any other kind of sale. And by the weight of authority, presumably for these reasons, a dealer is liable for selling such food even though in sealed containers of a reputable brand.'"[4]

In *Miami Coca Cola Bottling Company, Inc.* v. *Todd,* 1958, 101 So. 2d 34, the Florida court recognized the rule of the above cases in this comment:

"The bottler recognizes that Florida law places bottlers of cold drinks under the same rule of absolute

[4] The majority opinion takes note of the fact that two Justices concurred specially and two Justices dissented. None of them, however, differed with the majority in holding that the duty of the manufacturer was absolute. Judges Terrell and Hobson merely emphasized that they were in favor of holding the retail grocer, because otherwise the consumer in many cases could not reach the manufacturer. The dissenting Justices were in favor of holding the manufacturer, but not the dealer, to the same absolute liability the majority had declared to be the rule in Florida.

liability of implied warranty as canners of food. Florida Coca-Cola Bottling Company v. Jordan, Fla. 1953, 62 So. 2d 910."

In extending the implied warranty rule to a seller of seed, the Supreme Court of Florida, en banc,[5] recognized the continuing validity and vitality of the foregoing rules in these words:

"The general rule that an ultimate purchaser may not sue the wholesaler is not an absolute one and it seems to be losing force with the passage of time. For instance, this court has recognized the principle 'that *as to items of foods or other products* in the original package which are offered for sale for human consumption *or use generally*, a person who purchases such items in reliance upon the express or *implied condition or assurance that they are wholesome and fit* for the uses or purposes for which they are advertised or sold, and *who is injured as the result of unwholesome or deleterious substances therein* which are unknown to the buyer, may hold either the manufacturer or the retailer liable . . .'

"There is a conflict of opinion about the accountability of a manufacturer to a consumer on the theory of implied warranty in the absence of privity, but this court has become aligned with those courts holding that suit may be brought against the manufacturer notwithstanding want of privity . . ." [Emphasis added.]

The question of whether the rule of implied warranty in products cases arose from contract or from tort was settled by the Supreme Court of Florida in *Carter* v. *Hector Supply Co.*, 1961, 128 So. 2d 390, 391: "Perhaps in its judicial

[5] *Hoskins* v. *Jackson Grain Co.*, 1953, 63 So. 2d 514.

incipiency the rule of liability on implied warranty was grounded in some measure on the law covering deceit and therefore assumed the complexion of a tort action. However, it is now generally agreed that the implication of a warranty arises out of a contractual relationship . . . " That case involved an effort by a purchaser to apply the implied warranty rule against a seller with whom he was not in privity the subject of the sale not being for human use. In rejecting the application of the implied warranty rule in such a case, the court (p. 392) used language indicating clearly that, in products for human use cases where privity always exists, the implied warranty of the seller is absolute:

> "Again we emphasize that in the case at bar Carter relied entirely on an alleged implied warranty in order to *impose absolute liability regardless of fault* on the retailer with relation to whom there was no privity. Finding as we do that the lack of privity between these parties precluded the implication of a warranty, the plaintiff would necessarily be relegated to an action in tort for negligence. Actually this, in effect, is where the ultimate judgment of the court of appeal placed him. In that event, in the type of situation immediately before us, it would be necessary for him to prove that the retailer *knew, or should have known,* of the defective condition of the commodity. To this extent the court of appeal ruled correctly in holding that proof of this element would support a finding of fault on the part of the retailer. This is in direct contrast with the rule that *such proof is wholly unnecessary in an implied warranty situation* . . . " [Emphasis added.][6]

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[6] From these cases it is plain that Florida is in the vanguard of those states, as yet numerically in the minority, which are holding purveyors of food and other products for human consumption to an absolute liability under the doctrine of implied warranty. The cases on the subject are legion and are collected in annotations

A reading of these cases and authorities demonstrates to me clearly that Question 4 as framed was effective in presenting to the jury only the claim that Green's death resulted from American's negligence and that it ignored entirely the liberal Florida rule based upon implied warranty, which was covered by another count in the complaint. To establish their claim based upon negligence it was admittedly incumbent upon appellants to prove that American knew, or by the exercise of proper care—probably more than reasonable care—could have known, that the nicotine[7] and arsenic present in the smoke from Lucky Strikes were likely to do harm to the decedent. The count based on negligence was submitted to the jury, which found in favor of American and no appeal was taken from that portion of the verdict. But the duty of the appellants to prove that American could, by the reasonable application of human skill and foresight, anticipate that Lucky Strikes would endanger decedent's health was not, under Florida law, a part of an action based upon implied warranty.

Every warranty is a promise by him who makes it, a contract, a stipulation, an assurance that the subject of the warranty will be performed or that the warrantor will make good the loss arising from its breach. Under Florida's law, the implied warranty was an unconditional guarantee to Green that the use to which the cigarettes would be put,

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found in 74 A. L. R. 2d 1111 et seqs., 75 A. L. R. 2d 39, et seq. and 44, et seq., and 77 A. L. R. 2d, pp. 61, et seq., 66, et seq., and 122, et seq. And see "Implied Warranty in Florida," 12 U. of Fla. Law Review, 241, 245-246; Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)," 69 Yale Law Journal 1099; and Frumer and Friedman, "Products Liability" (1960), pp. 1-8.

[7] Defined in Webster's New World Dictionary, College Edition, p. 991, as "... a poisonous alkaloid ... found in tobacco leaves, from which it is extracted as a colorless, oily, acrid, transparent liquid ..."

as understood by all, would not do him harm by reason of any deleterious substance or ingredient contained in them.

I think the Florida cases establish a rule of law which constitutes a condition of every sale of a product for human consumption or use, which has the same legal effect in this case as if appellee had entered into a written contract with decedent, covering every package of cigarettes purchased by him, couched in these words:

> American guarantees that the cigarettes contained in this package are fit to be used by purchaser, a human being, by lighting and drawing smoke from them into the lungs, so that the ingredients of the cigarettes carried in the smoke may be deposited on the walls of the blood vessels situated therein, to the end that said ingredients will be absorbed into the blood stream and will produce in the smoker the soothing and relaxing sensations normally attending such use; that said cigarettes do not contain any harmful or deleterious substance; and that it will indemnify the user against any injury, loss or damage which may result from the smoking of said cigarettes.

II.

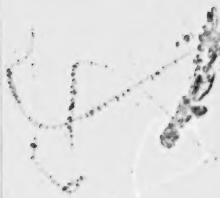
As I understand the majority opinion, the effort is made to distinguish the Florida cases from the one before us chiefly on the ground that the decided cases deal with situations where some foreign object or substance was at the root of the injury caused the user. I understand further that the majority thinks that the fact that the Florida court has, in several of the cases, adverted to the ease with which a manufacturer could determine the presence *vel non* of deleterious substances, as compared with the opportunity given the purchaser to gain such knowledge, demonstrates that the Florida Court intended to make proof

of foreseeability of harm by the exercise of reasonable care a *sine qua non* of recovery under the implied warranty rule. I am not able to agree with the majority on either score, and I think the italicized passages quoted from the Florida decisions, supra, demonstrate the error into which, in my opinion, the majority has fallen. A brief resume of the cases will be helpful.

In *Arnaud's* the presence of a piece of shell which should not have been in the dish served to the customer was mentioned, but what we stressed in that opinion was that the food *was in fact unwholesome when served.* It is clear from our opinion that the unwholesomeness alone fastened liability, the holding being that the seller was conclusively presumed to know of the existence of any unwholesome condition regardless of its cause, and that lack of knowledge is implied to him as a fault. This is plain from the language of the opinion, as well as the further holding that the implied warranty is that the product is *safe* for human consumption or use.

The Florida Court, in *Cliett,* held without equivocation that the seller is under an absolute liability if he serves unwholesome or impure foods regardless of their character or source. It emphasized too that the warranty applied to products for human use generally—not only food.

Spencer was decided on the allegations of the complaint. A storekeeper had served a can of sardines which, when eaten, produced sickness. The complaint alleged, alternatively, that the sardines "contained foreign or dangerous matter deleterious within itself." The court did not reject the complaint on the ground that it did not allege that the sardines contained some foreign matter, specified or otherwise. It was enough that *whatever the can of sardines contained was deleterious within itself.* That was held sufficient by the Supreme Court of Florida. As to the matter of knowledge of what was in the can of sardines or ability to



acquire such knowledge, the storekeeper of course was wholly without any means of obtaining knowledge—yet absolute liability was fastened upon him.

In *Hoskins* neither knowledge nor the presence of a specified foreign substance was mentioned. The opinion holds simply and clearly that there is absolute liability where products in the original package are sold for human use or consumption and that injury results by reason of the presence of some unwholesome or deleterious substance.

The Florida Court in *Carter* emphasized again that, where products were sold for human consumption, proof that the seller knew or ought to have known of the unwholesome condition was "wholly unnecessary."

I am unable to read into the Florida decisions the ideas which the majority advances as the basis for its failure to follow what seem to me to be the clear and unequivocal holdings of the cases discussed. It is true that the court adverts, more than once in these cases, to the plain fact that the manufacturer or seller was in much better position to acquire knowledge of the nature and characteristics of the ingredients of the thing sold than the purchaser for use. These discussions, it seems to me, were in justification of its determination to apply the stringent implied warranty doctrine to this limited field of sales contracts instead of imposing on the purchaser the difficult task of proving negligence. There is, as I see it, no indication that the court was intending to water down the absolute obligations of a contract of implied warranty to the level of proof governing tort actions.

It is significant also that American does not rely on a single Florida case to support its position. It is content to rely on the contention that, granted that Green died because he smoked Luck Strike cigarettes, the maker of them should not be held liable for his death unless the jury could find from the evidence that it could, in the exer-

cise of reasonable care, have known that the deleterious substances in Luck Strike cigarettes would do him harm. Little good will be done by discussing the cases from other states which do not follow the rule embraced by the Florida Court with respect to implied warranty as governing such sales. Since American prints, as an appendix to one of its briefs, the entire opinion of the Court of Appeals for the Third Circuit in *Otto E. Pritchard* v. *Liggett & Myers Tobacco Co.*, 1961, now reported in 295 F. 2d 292, I will comment on the holdings of that case which, it seems to me, contains more which is favorable to the Greens than to American.

In his action for damages based upon the claim that he had contracted lung cancer from smoking Chesterfield cigarettes between 1921 and the time his lung was removed in 1953, Pritchard based his claim of liability upon implied warranty of merchantability and negligence. The District Court for the Western District of Pennsylvania dismissed the action founded upon breach of warranty, and granted the Tobacco Company's motion for directed verdict as to plaintiff's charges of negligence. The Court of Appeals for the Third Circuit reversed both rulings. Since Pritchard's action was predicated upon Pennsylvania's Uniform Sales Act, which establishes quite different bases of liability, including the element of knowledge, from the common law of Florida as recognized by its court decisions, very little can be gained by discussion of this phase of the decision. It is sufficient to observe that the Court thought that the evidence adduced to the trial court was sufficient to support a case based upon Pennsylvania's restricted rule of implied warranty or upon negligence, and indicating even that it was sufficient to sustain a claim based upon express warranty.

III.

In *Pritchard* the plaintiff offered evidence, held inadmissible for insufficient proof, of the existence of 795 articles allegedly dealing with the harmful effect of tobacco upon the human body. Certainly such evidence, coupled with that in the record before us and information possessed by everyone,[8] make it certain that we are dealing with a situation of recognized seriousness.

IV.

An illuminating dissertation on "Implied Warranty in Florida" appears in the University of Florida Law Review, Fall 1959, Vol. XII, No. 3, pp. 241, et seq.[9] A quotation from two of its paragraphs will be found interesting:

> "The subject of products liability is probably the most rapidly expanding area of substantive law at the present time. There are at least three reasons for this: . . . Moreover, goods are frequently packaged in sealed containers, and often the purchaser does not have the ability, the opportunity, or the desire to make an inspection of the articles purchased. Third,

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[8] In the issue of Newsweek Magazine of March 19, 1962 is an article headed "On the Line Again," which describes a report just made by the Royal College of Physicians in London bearing the title "Smoking and Health." It is stated that the Society issued an unequivocal indictment of cigarettes. The statistics included in the report are anything but reassuring in connection with tobacco and lung cancer, coronary heart disease, and gastric ulcers. And the public press of April 7, 1962 carries a U. P. I. release which states: "The Italian parliament has passed a bill outlawing advertising for cigarets and other tobacco products."

[9] While a good number of the cases discussed in this dissent and in the majority opinion are analyzed in the article, its main conclusions are inapplicable to the problem before us inasmuch as it states, "The survey, however, will be confined to the questions of defects in the articles sold . . ."

the masterful and realistic logic of Mr. Justice Cardozo in the famous MacPherson v. Buick Motor Co. case, (111 N. E. 1050) in the year 1916 has given to courts and counsel strong impetus, and in some cases perhaps the necessary courage to re-examine previous decisions on the subject [Page 241] . . .

"By way of summary, it will be seen that although the doctrine of MacPherson v. Buick Motor Co. has been responsible for a great and beneficial change in the law relating to products liability there is still a great deal of confusion in a majority of the states and glaring contrast among the comparatively few settled principles as they are applied in the various jurisdictions. Happily, Florida has gone to the forefront of the states that have resolved the questions involved in this area in a logical and just manner . . ." [Pages 247-248]

Before summarizing briefly the points of difference between the majority and myself, I quote a rule which the authors of the Law Journal article distilled from two of the Florida cases which the majority and I have adverted to (Pages 253-254):

> "Five years after the Blanton case, Cliett v. Lauderdale Biltmore Corp. nailed down the liability in food cases.
>
> "Rule XI. *A seller of food for value to immediate consumers is absolutely liable for injuries as a result of unwholesomeness of the food on the implied warranty of fitness for human consumption regardless of negligence, the basis being the reliance of the consumer on the seller's skill and judgment.*" [Emphasis in the original.]

I understand to be basic in the rule of implied warranty of fitness announced by the majority "whether or not the buyer, at the time of the purchase, relies on the skill and judgment of the seller." There is no dispute on this question here. Green, before his death, testified that he bought Lucky Strike cigarettes in sealed packages from the grocery store just as he bought many items of food packaged by reputable manufacturers; that he had no notice that, and made no investigation to determine whether, harmful ingredients were present and that he had never had a cigarette subjected to chemical analysis and had never had an occasion to do so. He stopped using them when he was advised that he had contracted lung cancer.

The majority treats cigarettes in the original package as belonging in the category of foods as respects application of the doctrine of implied warrant.[10] But it segregates "products intended for human consumption" into "three different classes." In class one, it places most foods; in class two, it places alcoholic beverages; and class three includes cigarettes. The basis for this classification I have been wholly unable to find. Certainly, as I understand them, the Florida cases do not give any hint of such a classification.

Strangely enough, the majority holds that no absolute liability is imposed upon the seller of foods "believed by all to be wholesome." Liability as to food, according to its thinking, exists only where the food contains some foreign substance, is spoiled, or differs in some way from the prod-

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[10] There would seem to be no question as to this since the cases, beginning with the *Cliett* case, referred to "*foods or other products*" and added the words "use generally" as an alternative for the words "human consumption." As is pointed out above, the "consumption" of a portion of the smoke coming from Lucky Strike cigarettes is as real as the "consumption" of a portion of any item of food introduced into the human system through the alimentary canal.

uct it is represented to be. If the majority is correct in this, the writings of the Florida courts have, in my opinion, been in vain and the law of implied contracts governing sales of food is the same that it was before Mr. Justice Cardozo wrote the *MacPherson* opinion and the Florida Supreme Court decided the *Cliett*[11] case.

Nor do I find any statement in any Florida case which justifies the discrimination which the majority opinion makes in favor of purveyors of such articles as cigarettes. Finally, as I read them, the Florida cases do not justify the charge quoted in the majority opinion excepting the manufacturer from the absolute liability imposed upon it if the jury should find that the reasonable application of human skill and foresight would not reveal the harmful ingredients which the jury had found the accused cigarettes contained.

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[11] Sight seems to have been lost of the actions of the court below which are brought before us for review. The appellants filed in writing requests that the court spell out for the jury the Florida law of implied contracts as established with respect to products for human consumption. These several instructions refused by the court below incorporated principles taken directly from decided cases. Illustrative of them is Instruction No. 22 reading as follows:

"

Implied Warranty

"The Supreme Court of Florida has recognized that the principle 'that as to items of food or other products in the original package which are offered for sale for human consumption or use generally, a person who purchases such items in reliance upon the express or implied condition or assurance that they are wholesome or fit for the uses or purposes for which they are advertised or sold, and who is injured as the result of unwholesome or deleterious substances therein, which are unknown to the buyer, may hold either the manufacturer or the retailer liable.' "

Cited as support for this requested instruction were the *Hoskins* and *Clictt* cases, *supra*.

A long discussion was had between the lawyers and the court concerning the requested instructions. The court stated that an exception would be allowed with respect to each instruction which was marked refused and that it would not be necessary for the plaintiffs to take any further exception.

For these reasons I respectfully dissent.

A true copy

Test: Edward W. Wadsworth, Clerk, U. S. Court of Appeals, Fifth Circuit.

By (Signature illegible)

New Orleans, Louisiana, May 3, 1962.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19003

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(June 20, 1962)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and BELL, *Circuit Judges.*

PER CURIAM: So far as concerns this case, the following facts are established by the jury's answers to interrogatories under Rule 49 (b), Federal Rules of Civil Procedure: (1) The decedent Green had primary cancer in his left lung; (2) the cancer in his left lung was the cause or one of the causes of his death; (3) the smoking of Lucky

Strike cigarettes on the part of the decedent, Green, was a proximate cause or one of the proximate causes of the development of cancer in his left lung; (4) American Tobacco Company could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of Lucky Strike cigarettes, such as the decedent, Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung.

Those interrogatories were propounded and answered upon the assumption of certain facts which appear without dispute, such as: (a) At all pertinent times American Tobacco Company has been and still is the manufacturer and distributor of Lucky Strike cigarettes; (b) by February 1, 1956, the primary cancer in the left lung of decedent Green had been definitely diagnosed. He died on February 25, 1958.

In this diversity action, Florida law governs the rights and liabilities of the parties. Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung? There is no Florida decision precisely in point and so clearly on all fours as to be dispositive of this question or proposition of law.

In view of the importance of the question, and in especial consideration of the fact that one of the Judges of this

Court dissented from this Court's disposition of that question on original hearing, and that the Judges of this Court, on petition for rehearing, remain of the same views as expressed in their opinions on original hearing, this Court has decided to grant the petition for rehearing to the extent necessary to certify such question or proposition of the laws of Florida to the Supreme Court of Florida, as provided for under Section 25.031 Florida Statutes 1959, F.S.A., as implemented by Rule 4.61 of the Florida Appellate Rules (*In re Florida Appellate Rules*, 127 So. 2d 444, March 1, 1961). See *Clay* v. *Sun Insurance Office*, 1960, 363 U. S. 207, 212; *Sun Insurance Office* v. *Clay*, 133 So. 2d 735.

The parties are requested to stipulate, if possible, the contents of the certificate as provided for in said rule. If they are unable so to stipulate, they should report to this Court their respective views on or before August 1, 1962.[1]

To such extent the petition for rehearing is GRANTED.

[1] Such report may be typed, and accompanied by brief which may be either typed or printed, at least four legible copies to be filed.

APPENDIX C

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1963

Case No. 31,960

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

—VS.—

THE AMERICAN TOBACCO COMPANY,

Appellee.

(TWO APPEALS CONSOLIDATED)

Opinion filed June 5, 1963

On certification from the United States Court of Appeals for the Fifth Circuit

Neal Rutledge, Milledge, Rutledge & Milledge; Lawrence V. Hastings and Irma Feder, for Appellants

Hervey Yancey, Samuel A. Broadnax, Jr., Smathers & Thompson, Ralph D. Ray, Melvin D. Goodman and Janet C. Brown, for Appellee

DREW, *J.*

Pursuant to statutory certification procedure[1] the United States Court of Appeals for the Fifth Circuit has pre-

[1] Sec. 25.031, F. S.; F. A. R. 4.61. *Sun Insurance Office, Ltd.* v. *Clay*, Fla. 1961, 133 So. 2d 735. See also 24 F. R. D. 490; 16 Miami L. Q. 425; 55 N. W. L. 422; 40 Texas L. R. 621.

sented to this Court a question concerning implied warranty liability for lack of merchantability or fitness under Florida law, arising in an action for wrongful death consolidated with a suit instituted by the decedent Green prior to his death from lung cancer in 1958. The trial of the cause resulted in a general verdict for defendant, and the jury also answered a number of special interrogatories hereinafter detailed. Upon appeal the Court of Appeals affirmed, one judge dissenting, but in recognition of the controlling effect of Florida law in a diversity action a petition for rehearing was granted "to the extent necessary to certify [the following] question or proposition of the laws of Florida" to this Court:

> "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?"

We note at the outset that all questions of causation and privity are foreclosed by the terms of the question certified, which expressly assumes, as found by the jury's response to interrogatories in the trial of the cause, that defendant's cigarettes caused plaintiff's fatal cancer. We conclude also that the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of

law unmerchantable[2] in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstances of this case. The inquiry before us is, instead, limited to the status of Florida law upon imposition of liability "as for breach of implied warranty" when the manufacturer or warrantor "could not, by the reasonable application of human skill and foresight, have known of the danger."[2a] By response to a specific interrogatory the jury in this case found that the defendant, by this standard, could not at the pertinent time have known of the danger involved. The general verdict for defendant was responsive to the trial court's instruction that "implied warranty does not cover substances in the manufactured product the harmful effects of which no developed human skill or foresight can afford knowledge."

Upon the critical point, our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty, and the question certified must therefore be answered in the affirmative. As already indicated, we do not feel that the inquiry in terms either requests a response on the ultimate issue of liability in this case or requires any comment on the disposition of issues between the court and jury under the law relating to scope and breach of the implied warranty that a product supplied for human consumption shall be reasonably fit and wholesome for that general purpose.

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[2] Cf. *Food Fair Stores of Florida* v. *Macurda*, Fla. 1957, 93 So. 2d 860, cited in Frumer and Friedman, *Products Liability*, Sec. 25, and see also Sec. 29.03[1] on the problem of individual reactions to ordinarily harmless substances, discussion of which we deem unwarranted here because of the lack of Florida precedent and the limited issue posed in this nonadversary proceeding.

[2a] While not involved in the question before us, we note that the defense of assumption of risk is not asserted or involved in these proceedings.

Our conclusion on the point presented rests not only upon a determination, acknowledged in the opinion of the Court of Appeals herein, that there is no direct and affirmative precedent in our law for the "human skill and foresight" limitation on warranty liability, but also upon what seem to us clear and definitive pronouncements in our case law negativing this limitation. One of the more recent and exhaustive opinions is that in Carter v. Hector Supply Co.[3] This Court in that case expressly overruled the holding of the court of appeal "that proof of actual or implied knowledge of a defect on the part of a [defendant] is essential to his liability on an implied warranty."[4] "Implied knowledge" refers clearly to the situation where a defendant could, with reasonable diligence or "application of human skill and foresight," have had knowledge. The decision in Carter on this point of law therefore effectively negates any idea that proof of lack of opportunity for knowledge of a harmful condition might prevent implied warranty liability.

No reasonable distinction can, in our opinion, be made between the physical or practical impossibility of obtaining knowledge of a dangerous condition, and scientific inability resulting from a current lack of human knowledge and skill. Sencer v. Carl's Markets[5] imposed upon a dealer liability for sale of a can of sardines which he could not have known was dangerous without opening a sealed container and thereby destroying the product's salability. The opinion quotes with approval from text authorities[6] explaining the prevailing rule that the fact that a defect could not possibly have been known or discovered by a defendant does not prevent liability, because "the same

[3] Fla. 1961, 128 So. 2d 390.

[4] *Ibid.*, p. 392.

[5] Fla. 1950, 45 So. 2d 671.

[6] Williston on Sales, Rev. Ed., Vol. 1, p. 635.

argument . . . may be made in regard to any implied warranty, not only of food . . . where the buyer must have been aware that the seller could not discover a defect if it existed." This case illustrates, we think, that whatever may be the scope of an implied warranty in a given case, the basis of such liability is the undertaking or agreement, attributed by law, to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes. The assumption of responsibility, even implied assumption, is not, of course, necessarily co-equivalent with skill and knowledge. To the extent that our cases take note of a defendant's opportunity for knowledge,[7] it is merely in recognition of a supplier's superior position, relative to the purchasing public, as a factor affecting policy considerations rather than determining the limits of implied warranty liability in a particular situation.

The Florida decisions[8] recognize a distinction between the ordinary merchantability warranty involved in the instant case and a warranty of fitness for a particular purpose which "must and necessarily does depend upon whether or not the buyer relied upon his own judgment at the time of the purchase or relied on the skill or judgment of the seller." The opinions refer to the classical statement of

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[7] *Blanton* v. *Cudahy Packing Co.*, 154 Fla. 872, 19 So. 2d 313, 316:

> "The implied warranty theory of liability comports with the general trend of the best reasoned cases. The manufacturer knows the content and quality of the food products canned and offered to the public for consumption. The public generally is vitally concerned in wholesome food, or its health will be jeopardized. If poisonous, unhealthful and deleterious foods are placed by the manufacturer upon the market and injuries occur by the consumption thereof then the law should supply the injured person an adequate and speedy remedy. It is our conclusion that the implied warranty remedy of enforcement will accomplish the desired end." See also *Cliett*

[8] *Berger* v. *E. Berger*, 76 Fla. 503, 80 So. 296; *Smith* v. *Burdine's*, v. *Lauderdale Biltmore Corp.*, Fla. 1949, 39 So. 2d 476. *Inc.*, 144 Fla. 500, 198 So. 223, 229.

implied warranty law in Benjamin on Sales,[9] containing a full discussion of the derivation of these principles governing implied warranties in the common law. The decision in Lambert v. Sistrunk,[10] denying a merchant's liability for sale of a defective stepladder, is an application of one of the limiting principles discussed by Benjamin and incorporated in statutes on this subject: If the defect is discoverable by simple observation then the law will imply no warranty against its existence. The opinion in that case characterizes implied warranty liability as an exception to the doctrine of caveat emptor, and relates this liability to "the reliance by the buyer on the seller's judgment," but does not in terms or by implication limit such liability to the situation where a dealer or manufacturer could, by reasonable care or "application of human skill," have known of the danger. Whether or not reliance is justified, when the defect is one which a purchaser need not reasonably expect, would depend not on the actual state of human or industrial knowledge, which may be quite unknown to the purchasing public generally, but on what information the buyer may, under the circumstances, reasonably suppose the seller has.[11]

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[9] 5th ed., Ch. III, 595-651.

[10] Fla. 1952, 58 So. 2d 434, containing the following general comment:

> "It has been said that the concept of implied warranty rests upon the foundation of business ethics and constitutes an exception to the maxim 'let the buyer beware,' itself encompassing the idea that there is no warranty implied with respect to the quality of the goods being sold. To come into play, the exception must therefore spring from some moral obligation on the part of the seller, or perhaps more accurately, on the breach of some such duty amounting to fraud or the taking advantage of the buyer by reason of some superior knowledge in the seller, or the reliance by the buyer on the seller's judgment."

[11] *Cf. Smith* v. *Burdine's, Inc.*, note 8 *supra*. For a statement of the converse question of what a seller may reasonably expect a

In sum, our case law affirmatively supports and indicates no departure from the rule that implied warranty liability is not limited by the foreseeability doctrine, the "reasonable application of human skill and foresight" test of tort liability:

> ". . . The warranty of merchantable quality does not rest, and from the beginning did not rest, upon any such basis. It is a matter of contract, of interpretation of the language used in the light of the fact that the seller is a dealer, and dealers deal in merchantable goods. The only 'reliance' which it involves is reliance upon the seller's undertaking, as it is reasonably understood by the buyer. The pleasant sound of 'fitness for the purpose' should not be allowed to divert attention from one warranty to the other, or to obscure the fact that goods are merchantable only if they are fit for ordinary use. . . ." [12]

The contention that the wholesomeness of a product should be determined on any standard other than its actual

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purchaser to know, especially with regard to substances natural to a product, see Frumer and Friedman, note 2 *supra*, Vol. I, p. 671:

> "Probably the most thorough analysis and attack upon the 'foreign-natural' test is made in the recent decision in Betehia v. Cape Cod Corp. [103 N. W. 2d 64 (Wis. 1960)] The Wisconsin court, in that case, in a very extensive discussion, refused to hold that there was no breach of warranty or negligence as a matter of law where injury was caused by a chicken bone in a chicken sandwich. The court adopted the test of 'reasonable expectation,' stating:
>
> " 'What is to be reasonably expected by the consumer is a jury question in most cases; at least, we cannot say as a matter of law that a patron of a restaurant must expect a bone in a chicken sandwich either because chicken bones are occasionally found there or are natural to chicken.
>
> " 'This test as applied to an action for breach of the implied warranty is keyed to what is "reasonably fit." ' "

[12] Prosser on Warranty, Vol. 27, pp. 117-168, Minn. Law Review.

safety for human consumption, when supplied for that purpose, is a novel proposition in our law, and one which we are persuaded has no foundation in the decided cases. To hold that prevailing industry standards supplant the ordinary standard of objective truth and proof, and should be conclusive on the issue of a product's reasonable fitness for human use or consumption, would be to shift to the purchaser the risk of whatever latent defectiveness may ultimately be proven by experience and advancement of human knowledge, a risk which we are convinced was from the inception of the implied warranty doctrine intended to be attached to the mercantile function. There exists, we think, no real alternative and no valid objection to this distribution of the burden, if the public health is to be protected in any practical sense from exploitation by those who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume.

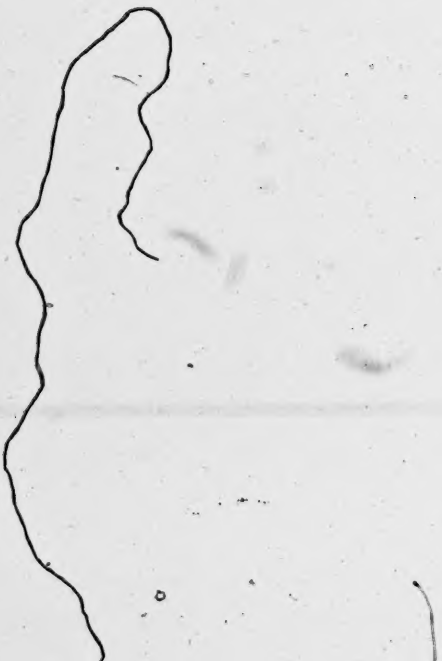
Accordingly, the question propounded to us, and found by us to be within the contemplation of our Rules, is answered in the affirmative as hereinabove set forth.

The Clerk of this Court shall forthwith transmit to the certifying Court a true copy hereof, and shall return to said Court any original papers or documents which may have been transmitted here for our inspection.

It is so ordered.

ROBERTS, *C.J.*, TERRELL, O'CONNELL and HOBSON (Ret.), *JJ.*, concur.

THOMAS and CALDWELL, *JJ.*, dissent.



APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19003

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(December 11, 1963.)

Before:

RIVES, CAMERON and BELL,

Circuit Judges.

RIVES, *Circuit Judge*:

First, to the Justices of the Supreme Court of Florida we wish to express publicly and with deep sincerity our appreciation for their answer to the question which we certified to that Court. See *Green* v. *American Tobacco Co.*, Fla. 1963, 154 So.2d 169; *Green* v. *American Tobacco Co.*, 5 Cir. 1962, 304 F.2d 70, 86. That answer has saved this

Court, through the writer as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice. The Supreme Court of Florida has been a very real help in the administration of justice.

Since the opinion of the Supreme Court of Florida, the parties have submitted to this Court additional briefs and oral argument. The appellants, plaintiffs below, would have us enter judgment for plaintiffs on the issue of liability and remand the case to the district court solely for the ascertainment of damages. The appellee, defendant below, insists that the judgments for defendant should be affirmed on grounds other than that decided by the Supreme Court of Florida, or, if the judgments for defendant are not now affirmed, that the case should be remanded for a full new trial.

The Supreme Court of Florida answered in the affirmative the following question certified to it by this Court:

> "'Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?'" 154 So.2d at 170.

The gist of the opinion of the Supreme Court of Florida is contained in the following response:

"Upon the critical point, our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty, and the question certified must therefore be answered in the affirmative." 154 So.2d at 170, 171.

The Florida Court was careful to limit its decision to that single response, saying:

"We note at the outset that all questions of causation and privity are foreclosed by the terms of the question certified, which expressly assumes, as found by the jury's response to interrogatories in the trial of the cause, that defendant's cigarettes caused plaintiff's fatal cancer. We conclude also that the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstances of this case. The inquiry before us is, instead, limited to the status of Florida law upon imposition of liability 'as for breach of implied warranty' when the manufacturer or warrantor 'could not, by the reasonable application of human skill and foresight, have known of the danger.' . . .

". . . . As already indicated, we do not feel that the inquiry in terms either requests a response on the ultimate issue of liability in this case or requires any comment on the disposition of issues between the court and jury under the law relating to scope and breach of the implied warranty that a product sup-

plied for human consumption shall be reasonably fit and wholesome for that general purpose." 154 So.2d at 170, 171.

What issues, then remain in the case? Clearly, the only ssues as to defendant's liability are those relating to im-plied warranty. As shown in our original opinion, *Green v. American Tobacco Company, supra*, 304 F.2d at p. 71, he plaintiffs asserted in separate counts six theories of iability, four of which were decided by the district court as matters of law against the plaintiff. On appeal, no error was claimed as to those rulings. The district court ubmitted the case to the jury upon only two theories of iability, breach of implied warranty and negligence. On ppeal the plaintiffs accepted the jury's finding that the lefendant was not liable for negligence. The only theory of liability remaining in the case is that of implied war-anty.

On Count 1 charging a breach of implied warranty, the ury returned general verdicts for the defendant and also nswered the four written interrogatories submitted under Rule 49(b), Fed.R.Civ.P., which were quoted in our original pinion, 304 F.2d at 71, 72.

The defendant insists that the scope of its implied war-anty was so limited that there was a total lack of evidence o support plaintiffs' claim of breach and, hence, that the udgments for the defendant must be affirmed notwithstand-ng the opinion of the Supreme Court of Florida. In vary-ng ways the defendant describes what it claims to be the imited scope of its implied warranty; e.g., (a) "that the rticle must be of the same quality, material, workmanship nd availability for use as others sold under the same rade name"; (b) that "there was [no] foreign substance r . . . spoiled, contaminated or other substandard in-redient which caused the injury, and such substance or

ingredient reflected a material difference between the article which caused the injury and the usual article sold under the same trade name"; (c) that "the Florida Supreme Court's rule is only that a product must be 'reasonably fit and wholesome' and have a 'reasonable fitness for human use or consumption'."

We need not review the Florida decisions as to the defendant's claimed limitations, such as those lettered (a) and (b), *supra;* for, whatever may be the general rule, very clearly the law of this case has established the scope of the implied warranty substantially as that lettered (c), *supra.*

There has never been presented by the evidence any contention that Lucky Strike cigarettes were more dangerous or had a greater propensity to cause lung cancer than cigarettes bearing other brand names. Nor has there been any contention that the cigarettes which Mr. Green smoked contained any foreign substance, or any spoiled, contaminated or other substandard ingredient which caused his injury and death. Instead, plaintiffs' contention from the beginning has been that cigarettes—not Lucky Strike cigarettes alone—cause lung cancer. If defendant's claimed limitations such as those lettered (a) and (b), *supra,* are true and sound limitations of the scope of its implied warranty, then the question which we certified to the Supreme Court of Florida and the responsive opinion of that Court have been mere useless abstractions.

In submitting the case to the jury, the district court charged as follows:

> "The manufacturer of products which are offered for sale to the public in their original package for human consumption or use *impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold,* but such implied warranty does not cover substances in the manufactured prod-

uct, the harmful effects of which no developed human skill or foresight can afford knowledge." (Emphasis supplied.)

That instruction was taken verbatim from plaintiffs' requested written charge No. 11 (R. pp. 1127, 1128), as to which the plaintiffs consented to the insertion of the adverb "reasonably" to modify "wholesome or fit" (R. p. 1075). The defendant made no objection to that part of the charge which we have emphasized, *supra*. That part was also substantially included in plaintiffs' requested but refused Charge No. 10 (R. p. 1126). As a part of the law of this case the parties are, therefore, bound by the scope of the implied warranty as so defined by the district court.

Further, while the Supreme Court of Florida, in its advisory opinion, declined to pass on the scope of warranty implied in the circumstances of this case, its footnote 11 (154 So.2d 172) impliedly rejected the "foreign-natural" test, and in the last quotation which we have made from the opinion, *supra* p. 2, it referred to ". . . the implied warranty that a product supplied for human consumption shall be reasonably fit and wholesome for that general purpose." That is, we conclude, a correct definition of the scope of the implied warranty under the law of Florida. See *McBurnette* v. *Playground Equipment Corporation*, Fla. 1962, 137 So.2d 563, 565. Certainly it is the definition by which the parties are bound as a part of the law of this case.

The defendant argues, however, that, even under that definition, it was entitled to a directed verdict because there was no evidence that Lucky Strike cigarettes were not "*reasonably* fit and wholesome." To products intended for human consumption, and the use of which may cause injury or death, the jury may properly apply a very strict standard of reasonableness.

Without examining the other voluminous evidence, a single reference to the testimony of Dr. Ernest L. Wynder will suffice to show that there was evidence from which the jury could properly conclude that the standard of reasonableness had been breached. Dr. Wynder testified that "smoking was a main factor in lung cancer" (R. 119); that the "risk of a very heavy smoker to develop lung cancer is at least twenty times greater than a non-smoker" (R. 135); that "the major cause of epidermoid lung cancer in man is cigarette smoking" (R. 142); that "the major factor that produces lung cancers in American males is smoking" (R. 186). Dr. Wynder conceded "that the vast majority of smokers do not get lung cancer" (R. 186, 187), but by "vast majority" he meant that "one in nine or one in ten" do develop lung cancer. (R. 188.) If the jury agreed with the testimony of Dr. Wynder, it could have reasonably inferred that the cigarettes were not *"reasonably* fit and wholesome." We conclude that the defendant was not entitled to directed verdicts on any of the grounds urged. We agree with the Supreme Court of Florida that "the general verdict for defendant was responsive to the trial court's instruction that 'implied warranty does not cover substances in the manufactured product the harmful effects of which no developed human skill or foresight can afford knowledge.'" 154 So.2d at 170. In conformity with the opinion of the Supreme Court of Florida that that instruction was erroneous, the judgments for the defendant must be reversed.

It does not, however, follow, as urged by the plaintiffs, that we should render judgments for plaintiffs on the issue of liability. The jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were *"reasonably* fit and wholesome." The jury did find that the smoking of Lucky Strike cigarettes on the part of the decedent, Green, was a proximate

cause of the development of cancer in his left lung which caused his death. It is possible, however, that those findings are consistent with the standard of reasonableness, for as this Court recently said: "Strict liability on the warranty of wholesomeness, without regard to negligence, 'does not mean that goods are warranted to be foolproof or incapable of producing injury . . . .'" *Lartigue* v. *R. J. Reynolds Tobacco Company,* 5 Cir. 1963, 317 F.2d 19, 37.

The plaintiffs urge that the defendant waived any further finding on the question of reasonableness by not requesting the submission of any interrogatory in addition to the four quoted in our original opinion, 304 F.2d at 71, 72. It must be remembered, however, that the district court did not require the jury "to return only a special verdict in the form of a special written finding upon *each issue of fact*" as permitted by Rule 49(a), Fed.R.Civ.P., but, instead, followed the procedure outlined in Rule 49(b) to "submit to the jury, together with appropriate forms of a general verdict, written interrogatories *upon one or more issues of fact* the decision of which is necessary to a verdict." It appears from the district court's charge to the jury that the written interrogatories were not intended to cover each and every issue of fact, but, "they are interrogatories which counsel described in their arguments, seeking to find from you your opinion on *certain factual matters* that have occurred in this trial." (Emphasis supplied.) It undoubtedly is true that the interrogatories submitted what the parties then considered to be the prime or important issues of fact, but, in the absence of any other evidence of waiver, and in the light of that part of the court's charge submitting the issue of reasonableness to the jury, which has been quoted, *supra* p. 4, we conclude that the defendant is not foreclosed from urging that issue on another trial. As said in *Moulor* v. *American Life Insurance Co.,* 1884, 111 U.S. 335, 337, the defendant's "will-

ingness, at one trial, to risk its case before the jury, upon a single one of several issues made, did not preclude it, at a subsequent trial, from insisting upon other defences, involving the merits, which had not been withdrawn of record, or abandoned in pursuance of an agreement with the plaintiff." [1]

With much force, the plaintiffs urge that "relitigation of defendant's liability herein would be unusually onerous because of the enormous amount of time, energy, and money required." The former trial took ten days, most of the time being devoted to issues relevant to liability vel non. As said in our original opinion, "the testimony at the trial was concerned principally with the issues of whether Mr. Green's death was caused by a cancer originating in the lung, that is, primary lung cancer, and whether that cancer was caused by his smoking of Lucky Strike cigarettes. Eight eminent medical doctors testified on each side." 304 F.2d at 72. A large part of the burden and expense necessary to be incurred by any of the parties may be obviated by observing that upon another trial, any party may introduce such part of the relevant evidence on the former trial as may be desired.

Further, while the general verdicts for the defendant are vacated, the parties are nonetheless bound by the jury's answers to the written interrogatories. The answers to (1), (2) and (3) (304 F.2d 71, 72) will be directly pertinent upon another trial. The parties may not re-litigate the issues thus already decided under the guise of presenting evidence on the issue of reasonableness, that is, as to whether the cigarettes were *reasonably* fit and wholesome. The evidence to be adduced on that issue must assume as

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[1] To similar effect, see Chase v. United States, 1921, 256 U.S. 1, 10; Davis v. O'Hara, 1924, 266 U.S. 314, 321; 5 Am.Jur. 2d Appeal and Error, §955, p. 382, n. 12; 5B C.J.S. Appeal and Error, §1989, p. 637, n. 25.

already conclusively established the issues decided by interrogatories (1), (2) and (3).

While the answer to interrogatory (4) no longer has any relevance to the question of defendant's liability, it does, in our opinion, effectively foreclose another issue which the defendant now urges; that is, that "plaintiff would have to satisfy the jury . . . that Mr. Green purchased Lucky Strike cigarettes 'in reliance upon' defendant's implied warranty."

The element of "reliance" in implied warranty liability is touched upon by the Supreme Court of Florida in its response, 154 So.2d at 172, 173. It is said that this liability is related to "the reliance by the buyer on the seller's judgment." Reference is made to an article by Dean Prosser in which he says: "The only 'reliance' which it involves is reliance upon the seller's undertaking, as it is reasonably understood by the buyer." The opinion refers also to the decision in *Lambert* v. *Sistrunk*, Fla. 1952, 58 So.2d 434, denying a merchant's liability for sale of a defective stepladder. In that case the Florida Court drew the distinction between the class of cases where the buyer relies on the seller's judgment and those in which there is no reliance, as follows:

> "There is no need to dwell on the class of cases where the buyer relies upon the seller's judgment of the fitness of a particular article for the purpose intended, because the use of a stepladder is as well known to a buyer as to a seller and is as limited as it is well known. This feature is common to the lipstick involved in Smith v. Burdine's, Inc., supra [198 So.2d 225]. The difference, as we have already observed, is in the nature of the articles sold. One cannot know the ingredients of a lipstick without chemical analysis. One can know as much as a salesman of a stepladder by simply looking at it. And this lack of opportunity to inspect was

also a factor in the case of Blanton v. Cudahy Packing Co., supra [19 So.2d 313]."

Lambert v. *Sistrunk, supra,* 38 So. 2d 435.

Again the response of the Supreme Court of Florida in this case states that ". . . the basis of such liability is the undertaking or agreement, attributed by law, to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes." 154 So.2d at 171. While the response advises that ". . . manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty . . ." (154 So.2d at 170), it would appear that the buyer is assumed to rely upon the seller's judgment in cases where the buyer neither knows nor has an opportunity to know of the unfitness or unwholesomeness. In such cases there is an undertaking or agreement on the part of the seller to be responsible in the event the cigarettes (to be specific) are not in fact reasonably wholesome or fit for human consumption.

It would be obviously impossible for the plaintiffs to prove any conscious or express reliance by Mr. Green on defendant's implied warranty. What the evidence does establish, and what the jury has in effect found, is that the circumstances of this case are such that it must be assumed that Mr. Green purchased the Lucky Strike cigarettes "in reliance upon" the defendant's implied warranty. That is no longer an issue in this case.

Finally, pointing to plaintiffs' requested instruction No. 10, the defendant insists that before finding for the plaintiffs, the jury must find that the cigarettes caused injury "while being used in a normal manner." A plea of contributory negligence is obviously inapposite to a claim

based on breach of implied warranty. However, an implied warranty encompasses only the ordinary use or purposes for which the article is sold. It seems to us that Mr. Green's smoking of the Lucky Strike cigarettes, as described in our original opinion (304 F.2d at 72), even to the extent of from one to three packages per day, was so clearly a matter to be expected among many smokers, and within the use or purposes for which the cigarettes were sold, as not to leave this element as a real issue in the case, unless on another trial a different state of facts is presented.

We believe that we have discussed all of the remaining issues suggested by the defendant. We have done so in the hope of more sharply defining the issues yet to be decided. It is our purpose, however, to aid, and not to limit more strictly than necessary the judgment and discretion of the district court. In simple summary, the parties are bound by the answers to the four interrogatories; any issue not inconsistent with those answers may be presented upon another trial. What has been said should be a sufficient guide for the district court, by further pretrial hearing or otherwise, to keep the issues within proper limits.

The judgments are reversed and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CAMERON, Circuit Judge, Concurring in part and in part dissenting.

The majority opinion in this case is a careful and accurate portrayal of the status of the case as it now stands before us. And it is a correct interpretation of the holding of the Supreme Court of Florida so far as it holds that the judgments of the court below must be reversed and the case remanded. I cannot join, however, in its conclusion that

we should not render judgments for plaintiffs on the issue of liability.

I.

For convenience, I quote the paragraph of the majority opinion which announces this latter conclusion—the point at which I am compelled to part company with my brethren:

> "It does not, however, follow, as urged by the plaintiffs, that we should render judgments for plaintiffs on the issue of liability. The jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were '*reasonably* fit and wholesome.' The jury did find that the smoking of Lucky Strike Cigarettes on the part of the decedent, Green, was a proximate cause of the development of cancer in his left lung which caused his death. It is possible, however, that those findings are consistent with the standard of reasonableness, for as this Court recently said: 'Strict liability on the warranty of wholesomeness, without regard to negligence, "does not mean that goods are warranted to be foolproof or incapable of producing injury . . ." ' Lartigue v. R. J. Reynolds Tobacco Company, 5 Cir., 1963, 317 F.2d 19, 37."

In order to demonstrate that *Lartigue* is not authority in this case, and that the majority fell into fatal error when it announced the foregoing quoted language as the basis for its conclusion that the plaintiffs were not entitled to a directed verdict on liability, it is necessary to set out substantially all of the paragraph in *Lartigue*, a portion of which the majority has quoted above. This is done in a footnote, and the textbook language which *Lartigue* quoted is italicized to separate it from this Court's language (317

F.2d 37, paragraph numbered [18].[1] *Lartigue* was quoting from a textbook based upon a California Appellate Court case which announced law which is wholly inconsistent with the law of Florida.

It is fair to say, I think, that the majority's entire reliance on *Lartigue* and the principles it stands for are in direct conflict with the decisions of Florida courts, including the specific holding of its Supreme Court in its answer to the question we certified to it (154 So.2d 169, 172-173).

II.

The majority here finds itself, I submit with deference, in the anomalous position of resting its decision as to the most crucial point in this case upon *Lartigue*, which in turn went astray because it bottomed its holding on the portion (304 F.2d at 73-77) of this Court's *original* opinion which was rejected by the Florida Supreme Court upon our submission to it. The vital language of *Lartigue* (317 F.2d

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[1] "Strict liability on the warranty of wholesomeness, without regard to negligence, *'does not mean that goods are warranted to be foolproof or incapable of producing injury * * * By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory.'*" The article sold must be unreasonably dangerous to the ordinary consumer, with the knowledge common to the community as to its characterization. For example, sugar is unwholesome to diabetics. Ice cream and butter may contain sufficient cholesterol to be unwholesome to persons with high blood pressure, and heart trouble. Whiskey is unwholesome to alcoholics. Diabetics who eat sugar, heart cases who cannot resist ice cream or butter, and alcoholics who drink too much whiskey know that the strict warranty of unwholesomeness puts no money in the bank for them. . . .

"[37] 2 Harper & James, Law of Torts, § 28.-22, p. 1584 (1961).

"'In a recent California case the Court said "The essential inquiry, thus, is the same in respect to the breach of warranty theory as to the negligence claim: whether the defendant complied with the standard of reasonable care in ascertaining the fitness of the chattel for the use for which he knew it was hired." Tierstein v. *Licht, 1959, 174 Cal.App.2d 835, 345 P.2d 341.'"*

37-39) was based upon, and in considerable part repeated, these rejected holdings of this Court's original opinion.

It follows, it therefore seems to me, that whatever may be the force of *Lorfigue*—decided two months before the Florida Supreme Court answered our question—in deciding a Louisiana case, it is no authority at all in this case based upon Florida law. Under that law it is not true that "By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory." The direct opposite is true. The instruction given by the court below and its accompanying Question No. 4 were predicated directly upon the negligence theory. Florida rejects that theory and holds that sales of goods for human consumption are not covered by the law of sales with its *caveat emptor* or the law of negligence with its doctrines of reasonable care. Instead, they are controlled entirely by the law of contracts. The contract here was between the Tobacco Company and Green. The warranty embodied by the law in every sale the Company made to him was that the cigarettes purchased by him would not do him harm.

It would, in my opinion, be a complete rejection of the law of warranty to hold that it could abrogate the requirement that one admittedly injured by the use of tobacco could not recover unless he showed further that the cigarettes were not reasonably fit and wholesome for use by the general public. Those words are used in the warranty to demonstrate the universality of its application. Every sale it makes carries a warranty to each and every member of the public. But each warranty is separate and covers the liability of the Tobacco Company to each separate individual to whom a sale is made. The finding of the jury has settled the fact that the cigarettes sold to Green were not reasonably fit and wholesome for use by him. No other question is, in my opinion, involved under the law of Florida with which alone we are dealing.

III.

The question here under consideration is, in reality, the same question which was debated at great length between the majority and the dissenting opinions in the initial decision of this case by this Court.[2] A reading of those two opinions will, it seems to me, cover essentially the point of difference which still persists between the majority and myself. I think no good purpose will be served by repeating the argument made in that dissent and that it is sufficient to refer to it. I undertook to analyze every applicable Florida case and to demonstrate that under the Florida cases, Question No. 4 should not have been submitted to the jury. The Supreme Court of Florida has decided the point submitted against the holding of the majority in that case and in favor of the arguments set forth in my dissent.

In answer to the question we addressed to the Supreme Court of Florida, which the parties stipulated as encompassing the question which would decide the outcome of this litigation, the Supreme Court of Florida answered in effect as follows:

> Yes, the law of Florida imposes on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, notwithstanding the fact that the defendant manufacturer and distributor could not, on or before February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes

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[2] Green v. American Tobacco Company, June, 1962, 304 F.2d 70, dissenting opinion, 77.

would be endangered, by the inhalation of the mainstream smoke from such cigarettes, of contracting cancer of the lung.

It seems certain that, when we submitted that question, the members of the Court thought its answer would dispose of the case. The parties evidently thought the same thing, because they agreed to the asking of this question. I see nothing else for the jury to pass upon, unless the Tobacco Company is to be permitted to bring in a hundred or a thousand witnesses whom Lucky Strike Cigarettes have not yet harmed, in an effort to show that the warranty given by the Tobacco Company to Green was not in fact broken.

But the record before us reveals no effort by either party to show that the cigarettes were not reasonably fit and wholesome as to any person besides Green. If that be the thrust of the majority opinion, I think it is fair to say that neither party raised such an issue in the arguments before us on the trial of the original appeal; that this Court never conceived that such an issue was in the case; that the Supreme Court of Florida has not intimated that such an issue does remain in the case, and that no Florida decision is cited—and none can be found by me—which holds such an issue to be relevant to a trial upon implied warranty.

The law seems to be settled that:

> "In civil cases it is a well-recognized rule that questions not advanced on the original hearing will not be considered on the petition for a rehearing . . . " 5 Am. Jur.2d, Appeal and Error, §987, page 412.

I think that the judgment below should be reversed and remanded for trial of the issue of damages alone. I, therefore, respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana.

JAN 15 1964

[SEAL]

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 19003

D. C. Docket Nos. 3070-M-Civil & 8505-M-Civil

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before:

RIVES, CAMERON and BELL,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, on rehearing and reargument by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered and adjudged that the appellee, American Tobacco Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Concurs in part
and dissents in part" December 11, 1963

Issued as Mandate:

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1963

The AMERICAN TOBACCO COMPANY,
Petitioner,

v.

Edwin GREEN, Jr., etc., et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 961. Decided May 25, 1964.

The petition for a writ of certiorari is denied.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1964

Edwin GREEN, Jr., etc., et al.,
Petitioners,

v.

The AMERICAN TOBACCO COMPANY,
Respondent.

ON CROSS PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 997. Decided May 25, 1964.

The cross petition for a writ of certiorari is denied.

APPENDIX G
CORRECTED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22435

MARY GREEN and EDWIN GREEN, JR.,
Appellants,

versus

AMERICAN TOBACCO COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(January 24, 1968.)

Before PHILLIPS,* COLEMAN and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: This is an appeal from a jury verdict and judgment for the defendant in the second trial of a suit on implied warranty, grounded on a prior jury finding in the same case that plaintiff's decedent died of cancer and that smoking cigarettes was a cause thereof. For the second time, we reverse and remand for a new trial.

---

* Of the Tenth Circuit, sitting by designation.

Nearly ten years ago, in December, 1957, Edwin Green, Sr. brought suit against the American Tobacco Company, claiming that he had incurred lung cancer as a result of smoking the defendant's product, Lucky Strike cigarettes.

About two months after filing the suit, on February 25, 1958, Mr. Green died. His administrator was substituted as plaintiff and his widow also filed suit under the Florida Wrongful Death Statute. On two theories of liability, breach of implied warranty and negligence, the cases after consolidation were tried to a jury, which returned general verdicts for the defendant. In answer, however, to certain interrogatories submitted under Rule 49(b), Federal Rules of Civil Procedure, 28 U.S.C.A., the jury in this first trial found that Mr. Green had primary cancer of the lung, that this was the cause or one of the causes of his death, and that smoking Lucky Strike cigarettes was a proximate cause or one of the proximate causes of the cancer. Notwithstanding this finding, the verdict went to the defendant because, in response to another interrogatory, the jury further found that on or prior to February 1, 1956, the defendant Tobacco Company by the reasonable application of human skill and foresight could not have known that users of Lucky Strike cigarettes, such as Mr. Green, would thereby be put in danger of contracting lung cancer.

Of course, the plaintiffs appealed. On May 2, 1962, 304 F.2d 70, a panel of this Court composed of

Judges Rives, Cameron, and Griffin Bell[1] affirmed the judgment in favor of the cigarette manufacturer. In that opinion the result turned on the jury finding that there was no developed human skill or foresight which could have afforded the manufacturer a knowledge of the harmful effects. Judge Cameron dissented, quite cogently pointing out that even for breach of implied warranty the decision amounted to a holding that the exercise of reasonable care on the part of the Tobacco Company would exonerate it from liability.

On petition for rehearing, decided June 20, 1962, 304 F.2d at page 85, rehearing was granted to the extent of certifying to the Supreme Court of Florida[2] the following question:

> "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956 and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the ressonable application of human skill and foresight, have known that users of such cigarettes would be endangered by the inhala-

[1] Judge Rives has since retired from active service and Judge Cameron died April 2, 1964.

[2] § 25.031, Florida Statutes, 1959, F.S.A.
Supreme Court authorized to receive and answer certificates as to state law from federal appellate courts.

tion of the main stream smoke from such cigarettes of contracting cancer of the lung?"

[154 So.2d at 170].

It is to be noted that the question begins "Does the law of Florida impose on a manufacturer and distributor of cigarettes *absolute liability as for breach of implied warranty* [?]". It was nearly a year before the Supreme Court of Florida responded in a 5-2 decision [154 So.2d 169, June 5, 1963]. The Court concluded:

> "That the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstance of this case. The inquiry before us is, instead, limited to the status of Florida law upon imposition of liability 'as for breach of implied warranty' *when the manufacturer or warrantor 'could not by the reasonable application of human skill and foresight, have known of the danger'.*" [emphasis ours]

The Florida Supreme Court proceeded to state in clear and unmistakable language:

"That a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty, and the question certified must therefore be answered in the affirmative. As already indicated, we do not feel that the inquiry in terms either requests a response on the ultimate issue of liability in this case or requires any comment on the disposition of issues between the Court and the jury under the law relating to scope and breach of the implied warranty that a product supplied for human consumption shall be reasonably fit and wholesome for that general purpose."

The Court went on to say, however,

"The contention that the wholesomeness of a product should be determined *on any standard other than its actual safety for human consumption, when supplied for that purpose, . . . [is] one which we are persuaded has no foundation in the decided cases.*" [Again emphasis ours].

Six months later, again with Judge Cameron dissenting, this Court held that it could not enter judgment for the plaintiffs on the issue of liability, 325 F.2d 673, for the reason that:

"The Florida Supreme Court's rule is only that a product must be 'reasonably fit and

wholesome' and have a 'reasonable fitness for human use or consumption'."

With deference, we feel that this view overlooked the language italicized immediately above but the views of the prior panel would be binding upon us, of course, were it not for developments later to be discussed.

The Court of Appeals further pointed out that on the first trial of the case in the District Court the jury, at the request of the plaintiffs, had been charged that "The manufacturer of products which are offered for sale to the public in their original package for human consumption or use impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold * * * ." The adverb "reasonably" to modify "wholesome or fit" had been inserted in the instruction at the consent of the plaintiffs. The original Panel then said, "As a part of the law of this case the parties are, therefore, bound by the scope of the implied warranty as so defined by the District Court".

This was followed by the crucial determination, 325 F.2d at page 677, that the jury had not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were 'reasonably fit and wholesome' and therefore the defendant was not foreclosed from developing that issue on another trial.

We then directed:

> "[T]he parties are nonetheless bound by the jury's answers to the written interrogatories [and] may not relitigate the issues thus already decided [that smoking Lucky Strike cigarettes was one of the causes of the cancer and that the cancer was one of the causes of the death] under the guise of presenting evidence on the issue of reasonableness, that is, as to whether the cigarettes were *reasonably* fit and wholesome."

Judge Cameron, concurring in part and dissenting in part, was of the view that the warranty "Was that the cigarettes purchased by [Green] would not do him harm" and that the plaintiffs should not be required to show "that the cigarettes were not reasonably fit and wholesome for use by the general public".

As far as we can tell, the parties made no further effort to obtain the direct, positive answer of the Supreme Court of Florida to that part of the original question which had propounded the inquiry, "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty . . . . [?]".

The plaintiffs might well have been encouraged to do so in view of the language which the Florida Court had added to the effect that *actual safety for human*

consumption was the standard for the determination of the wholesomeness of a product.

The result of the foregoing was that the case went to a second jury trial in which, pursuant to the opinion of 325 F.2d 673 the sole issue (and any factor not inconsistent therewith) was whether the cigarettes used by Mr. Green were reasonably fit and wholesome for human use, the parties being expressly commanded not to attempt to relitigate the already established facts that Green died of lung cancer and that the cigarettes were a cause of that cancer.

The jury verdict again was for the Tobacco Company. The judgment thereon was dated November 27, 1964.

The date is significant for, thereafter, on May 5, 1965, in the case of *McLeod v. W. S. Merrell Company, Division of Richardson-Merrell, Inc.*, 174 So.2d 736, the Supreme Court of Florida stated that *Green v. The American Tobacco Company*, 154 So.2d 169, was:

"A suit against a manufacturer. It involved a commodity which was available indiscriminately to the public generally. *Green* can be summarized as a case which applied a rule of absolute or strict liability to the manufacturer of a commodity who had placed it in the channels of trade for consumption by the public generally".

I.

We now come directly to the question of whether the Judgment under review is to be affirmed or reversed.

We are confronted with specifications that the District Court erred in the following respects:

> 1. In denying Plaintiff's Motion for Directed Verdict on the Issue of Liability made at the close of the defendant's case and renewed at the close of all the evidence as the evidence conclusively established defendant's breach of implied warranty of reasonable fitness for human consumption and use . . . .
>
> 2. In charging the jury that a breach of implied warranty of reasonable fitness for human consumption and use occurs only if defendant's cigarettes endanger "any important number of cigarette smokers—any responsible number—any large segment . . . any responsible segment of the general public . . . as to the threat of lung cancer," such surprise charge having effectively directed a verdict for defendant . . . .
>
> 3. In permitting defendant's expert witnesses to testify that they do not know the cause of lung cancer and that nobody knows the cause of lung cancer . . . .

> 4. In excluding certain kinds of evidence, i.e., testimony concerning (1) animal experimentation and (2) the 'Report of the Surgeon General's Committee' and other scientific authorities as well as work done by the testifier with other persons . . . .

We shall dispose of minor matters first.

In our view, the trial court denied both sides an opportunity to offer evidence of out of court experiments on animals and this was not erroneous, *Bish v. Employers Liability Assurance Corp.*, 5 Cir., 1956, 236 F.2d 62; *Travelers Insurance Company v. Wilkes*, 5 Cir., 1935, 76 F.2d 701.

Neither did the Court commit reversible error in declaring inadmissible the surgeon generals report, *Bish, supra; Rice v. Clement*, Fla., 1966, 184 So.2d 678.

Of course, an expert may give an opinion based on the results of experiments by others and in that connection may describe such experiments, *Woelfle v. Connecticut Mut. Life Ins. Co.*, 8 Cir., 1939, 103 F.2d 417, 418; *Cf. International Paper Co. v. United States*, 5 Cir., 1955, 227 F.2d 201, 208. We have previously indicated our acceptance of the majority view that experts may not be cross examined by the use of scientific works unless they relied on the very work which the cross examiner wishes to use, *Bish, supra.*

We cannot reverse for the giving of the charge described in Specification No. 2. The giving of this supplemental charge was caused by a controversy after the jury had retired as to whether the Court had inadvertently used the word "admissions" instead of findings" [of the jury in the first trial]. Out of a commendable desire to clear up any possible chance of error on this point, the Court had the jury called back into the courtroom, after which this took place:

"THE COURT: . . . I also told you that the question was one of a common danger to the general public as distinguished from Mr. Green. That is for your determination. And if these cigarettes did endanger any important number of cigarette smokers—any responsible number—any large segment of those smokers—then it would be a breach of the implied warranty for fitness, which is imposed upon the manufacturer who sells the cigarettes. If they did not, there would be no breach of warranty . . . .

"MR. HASTINGS [Plaintiffs' counsel]: May we approach the bench?"

(Side Bar Conference out of the hearing of the jury)

"THE COURT: Counsel do not like the words 'important number'. They think that it is a little bit too definite. I mean does it endanger any responsible segment of the general public. Does cigarette smoking en-

danger them as to the threat of lung cancer? If it does, the implied warranty is violated."

From the foregoing it is quite plain to us that plaintiffs' counsel did object to the language of the supplemental charge, but he did not make the content of his objection a matter of record. Obviously, the Court then attempted to amend the charge so as to eliminate the objection, whatever it was. Thereafter, counsel offered no further exception. As amended, the language as to important numbers or large segments was, in effect, withdrawn. Thus, if there was any error in the amended supplemental charge, viewed as a whole, which we doubt, it certainly was not plain error. Therefore, in the absence of exceptions properly reserved we do not now consider it, Rule 51 *Fed. R. Civ. P.*, 28 *U.S.C.A.*

Nor do we find any merit in appellants' contention that they were entitled to a directed verdict on the issue of liability. It is argued that the defendant's evidence was valueless and that this panel should now overrule the prior decision which constituted the law of the case on the second trial. Going to the heart of the matter, we simply say that the District Court had to retry the case under the directions he had received from this Court. The value of the evidence and all inferences reasonably to be drawn therefrom, was as of the date of that particular trial for the jury to decide.

The second trial was a forensic battle of experts. The testimony of plaintiffs' expert witnesses tended to show that cigarette smoking causes approximately 10% of heavy [as the witnesses defined the term] cigarette smokers to die of lung cancer after about twenty years of smoking.

Appellee met this proof in the following manner:

Dr. Moran testified that in his studies and research he had attempted to find out the cause of lung cancer but, "I don't know the cause of it". To this point there was no objection. Dr. Moran was then asked if he had any reasonable medical opinion as to whether or not the smoking of cigarettes has any bearing upon lung cancer. *The plaintiffs' objection was overruled.* The witness then testified:

"Q. Can you say with reasonable medical certainty that smoking of cigarettes is the cause of lung cancer in the public?
A. No, sir.
Q. Do you know what does cause lung cancer or cancer in any other part of the body of a human being?
A. No, sir."

This was followed by other testimony:

DR. T. L. JACKSON:

"Q. Since you are in the cancer field, Doctor, do you know the cause of cancer?
A. I do not know the cause of cancer.

* * * *

Q. Do you know of any definite link between smoking and lung cancer in people who smoke?

A. I do not know of any actual proven fundamental link between cigarettes and lung cancer . . . ."

No objection was made to this testimony.

DR. HOCKETT:

"Q. Doctor, do you know the cause of cancer in the human body?

A. No, sir, I do not."

No objection was made to this testimony.

DR. FLIPSE:

"Q. Do you know the cause of lung cancer?

A. No.

Q. Do you think there is any causal connection between smoking and lung cancer?

A. Personally I don't believe there is; but that is a question that I cannot decide because we don't know the cause."

The following exchange then occurred:

"[DR. FLIPSE] We know many of the basal conditions that go with a change of cancer, but we don't know the cause.

Q. Sir, would you name some of the things that medicine is working on now to try

to determine if that is a cause or is related to the beginning of cancer?

MR. HASTINGS:

We object. One of the bases if repetitious and, too, this is not related to whether cigarettes are or are not the reason—are reasonably fit for human consumption.

THE COURT:

Doctor, only speak as to your own knowledge, what you know. He is not asking you what you suspect but what you know.

I believe you answered part of it. Nobody knows the cause of cancer; is that right?

THE WITNESS:

Nobody knows the cause.

THE COURT:

You mean what he knows or what he suspects is the cause of cancer based upon his medical experience.

MR. BRADFORD:

Answer that question.

A. Please read the question.

THE COURT:

Have you arrived at any conclusion based upon your medical knowledge as to the suspected causes of cancer?

THE WITNESS:

I have not."

Finally Dr. Flipse testified on cross examination,

> "We cannot say it is due to something we inhale . . . . Basically, we don't know what causes it."

When the defense rested, the attorney for the Greens made the following motion:

> "MR. HASTINGS:
>
> Your Honor, before we recess, we would like to move to strike the testimony of Dr. Burford, Dr. Flipse, Dr. Little and Dr. Jackson, who gave opinions to the effect that there was no relationship between smoking and cancer on the basis that the Fifth Circuit clearly stated that any evidence adduced with regard to this must assume as conclusively established the fact that one man, Edwin Green, had died of cancer of the lung as a result of smoking; and therefore we feel that the testimony by these witnesses should not be considered.
>
> THE COURT:
>
> Denied."

It will now be recalled, and it is appropriate that we should emphasize it, that the prior jury had expressly found that smoking Lucky Strike cigarettes was one of the proximate causes of the cancer and that the cancer thus caused was, in turn, one of the proximate causes of death. We likewise recall the emphatic, explicit instructions of this Court when it remanded

he case that the parties were bound by these findngs and *that the parties could not relitigate the issues thus aready decided under the guise of presenting evidence on the issue of reasonableness.*

Appellee says that this line of testimony should have een admissible for the reason that if the cause of ancer is unknown then it cannot be said that cigrettes [as a cause of cancer] are not reasonably t and wholesome for consumption by the general ublic. We do not feel that juries may be required to eturn verdicts on choices between mutually impossile propositions. Although the jury in this second trial as unalterably bound, and so informed, by the findg of its predecessor that cancer had indeed been a ause of the death of Mr. Green and that smoking ucky Strike cigarettes had been one of the proxiate causes of that cancer, it repeatedly heard from xperts which it had the inherent province of believg, if it chose, that such could not possibly be true nce none know the cause of cancer and, therefore, annot prove the cause. That was not the standard on which this Court directed that the case should retried. There was express direction that the cause death must not be relitigated in the course of setng the question of reasonable safety for use by the neral public.

In all fairness, we must likewise recognize the ually distressing predicament of the trial judge. At e first blush he was presented with the previously termined fact that deceased had died from the

use of a product, and then he was told to preside over the determination of whether such a product nevertheless was reasonably safe for use by the general public.

The answer to this dilemma, in our judgment, was that appellee could have rebutted plaintiffs' proof as to the incidence of lung cancer in cigarette smokers without presenting testimony categorically contradictory to that which had already been found as a fact.

For these reasons, this judgment must be reversed and remanded for a new trial.

II.

The matter does not end here.

In the absence of some material change of controlling state law, occurring since the date of our former decision, December 11, 1963, 325 F.2d 673, the directions of our former remand remain the law of this case and would have to be adhered to on the second remand.

On the other hand, if there has been a material change in the controlling state law, either by enactment or by clarifying interpretation, we are bound to follow the law as it now exists, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941); *Huddleston v. Dwyer*, 322 U.S.

232, 64 S.Ct. 1015, 8 L.Ed. 1246 (1944); *Jones v. Schellenberger*, 7 Cir., 1955, 225 F.2d 784, *cert. denied*, 350 U.S. 989, 76 S.Ct. 476, 100 L.Ed. 855 (1956).

After the argument of this appeal we requested the parties to file, and we have received, briefs on the question of whether such a change has, indeed, taken place.

There no longer remains any doubt of the power and duty of this Court in proper cases to direct the entry of a judgment n.o.v., *Neely v. Martin K. Eby Constro. Co., Inc.*, 386 U.S. 317, ... S.Ct. ...., ... L.Ed.2d .... (1967).

We have heretofore referred, at page 4, to the language of the Supreme Court of Florida when it answered our certified question, as follows:

> "The contention that the wholesomeness of a product should be determined on any standard other than its actual safety for human consumption when supplied for that purpose . . . [is] one which we are persuaded has no foundation in the decided cases."

We must emphasize the words "actual safety" appearing in the above passage.

Then, as already pointed out, page 7 ante, after the second trial below [the trial now under consideration] the Supreme Court of Florida, in *McLeod v. Merrell, supra*, May 5, 1965, took occasion to explain

what it had meant in *Green v. The American Tobacco Company*, 154 So.2d 169. It said that on the facts of this case it had applied the rule of *absolute* or strict liability (see quotation alluded to).

On April 28, 1965, the Supreme Court of Florida decided the case of *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221. The accused product was a bottle which contained reducing pills. When the prospective user attempted to open the bottle by unscrewing the top it broke, fragmented, and thus lacerated her right wrist. Suit was brought on negligence and breach of implied warranty. The Supreme Court held that a retailer's implied-warranty liability as to food did not extend to this container. In the course of arriving at this decision, however, and referring to cases previously decided as to tinned meat, and canned sardines,[3] the Court stated that it had twice previously affirmed the principle that

[3] *Blanton v. Cudahy Packing Co.*, 19 So.2d 313 (1944); *Spencer v. Carl's Market*, 45 So.2d 671 (1950).

Other Florida decisions as to products intended for human use are:

(1) Human blood used in transfusions, *Russell v. Community Blood Bank*, 185 So.2d 749, 196 So.2d 115 (1966-1967).

(2) Candy bar, *Wagner v. Mars, Inc.*, 166 So.2d 673 (1964).

(3) Soft drinks, *Miami Coca Cola Bottling Co. v. Todd*, 101 So.2d 34 (1958).

(4) Restaurant food, *Cliett v. Lauderdale Biltmore Corp.*, 39 So.2d 476 (1949).

We note that as to food or products intended for human use generally the Florida cases make no reference to "reasonable fitness" or "reasonable wholesomeness".

These limitations have been applied, however, to products not intended for human consumption, as in *Wisner v. Goodyear Tire and Rubber Co.*, Dist. Ct. App. 167 So.2d 254 (1964) involving pipe for use in residential lawn sprinkling systems, and *Renninger v. Foremost Dairies, Inc.* (1965) cited in the text.

We think the Florida cases are in agreement with what the Supreme Court of Texas held in *McKisson v. Sales Affiliates*, 416

> "'* * * * as to items of food or other products in the original package which are offered for sale for human consumption or use generally, a person who purchases such items in reliance upon the express or implied condition or assurance that they are wholesome and fit for the uses or purposes for which they are advertised or sold, and who is injured as the result of the unwholesome or deleterious substances therein which are unknown to the buyer, may hold either the manufacturer or the retailer liable in damages for injuries sustained by him, on the theory of an implied warranty of wholesomeness or fitness of such article or product for the purposes for which it was offered to the public".

Foley was decided two years after our original remand and directions in this case. The significant thing is that as to products intended for human use generally neither *McLeod* nor *Foley* anywhere modified or limited the requirement of fitness or wholesomeness to "reasonable fitness" or "reasonable wholesomeness".

On February 9, 1965, the District Court of Appeal of Florida, Third District, 171 So.2d 602, cert. denied, Florida Supreme Court, 177 So.2d 480, decided

S.W.2d 787, June 7, 1967, that "no sound distinction can be drawn between the use of an eye-wash solution that impairs or destroys vision and a foodstuff which causes illness". *Russell v. Community Blood Bank*, above cited, is to that effect.

Renninger v. Foremost Dairies, Inc., involving a defective milk bottle. While imposing the reasonable fitness limitation to this object not intended for human consumption, the court nevertheless quoted verbatim the foregoing passage from *Foley*.

In the light of these decisions, rendered subsequent to our former opinion, we are now left in no substantial doubt that under Florida law the decedent was entitled to rely on the implied assurance that the Lucky Strike cigarettes were wholesome and fit for the purpose intended and that under the facts found by the jury his personal representative and widow are entitled to hold the manufacturer absolutely liable for the injuries already found by a prior jury to have been sustained by him.

This being so, in addition to reversing this judgment and remanding for a new trial we must also direct the District Court to enter judgment for the plaintiffs on the issue of liability and to submit the issue of damages to another jury.

REVERSED and REMANDED, with directions.

SIMPSON, Circuit Judge—dissenting:

With deference, I dissent from the majority opinion. I view the second trial of this case as having been fairly conducted under the standards laid down by this Court on remand, *Green v. American Tobacco*, 325 F.2d 673. Further, I can perceive no "cogent rea-

on"[1]—either a change in controlling law or any oth-
r—for reversing the prior panel of this Court and di-
ecting that the court below enter judgment n.o.v.
or plaintiffs on the issue of liability.

I.

I understand Part I of the majority opinion to hold
he trial judge in error for refusing to strike the testi-
ony of the defendant's expert witnesses quoted on
ages 11, 12, 13 and 14 of the opinion, to the general
ffect that they did not know the cause of cancer, and
at they did not believe there was a causal connec-
on between smoking and lung cancer. This line of
stimony was opened up by and in direct response
testimony by the plaintiffs' experts to the effect
at cigarette smoking causes lung cancer in a size-
ble part of the smoking population, that one out of
ne or ten heavy cigarette smokers die of lung can-
er, that 30,000 or 35,000 deaths yearly in the United
ates are caused by lung cancer caused by ciga-
tte smoking and that there is a much greater inci-
ence of lung cancer in the half of the adult popula-
on that smokes. The jury was left to draw the in-
rence that defendant's cigarettes are not reason-
ly fit for human consumption.

It should be noted that *plaintiffs'* expert witnesses
stified either on direct or cross-examination to sim-
r lack of knowledge as to the cause of cancer.[2]

[1] *Lumbermens Mutual Casualty Co. v. Wright*, 5 Cir. 1963, 322
d 759 at 763; cert. denied 351 U.S. 939, 77 S.Ct. 1397, 1 L.Ed.2d
6; *Lincoln National Life Insurance Co. v. Rooth*, 5 Cir. 1962,
F.2d 110.

[2] Dr. Winder: "Nobody knows what the basic cause of cancer
. . ." (R. 184) (Direct). Dr. Levin: "there is no known

That long, costly and intensive research in depth aimed at discovering the cause or causes of cancer by both public and private agencies is continuing, and s so far unsuccessful is a matter of general, practically universal knowledge. It is a fact of our daily ife as well known to laymen as to doctors or judges. Of course it was known to the members of this jury. The receipt of this intelligence could hardly have ome as a shock to them.

In his jury instructions the trial judge made it bundantly clear that "in a previous determination it as determined that one of the proximate causes of is (Edwin Green's) death was the smoking of these igarettes." Earlier the jury had been instructed: "It as been determined that Green smoked cigarettes nd one of the proximate causes of his death was ng cancer caused by cigarettes. But now we are ot concerned particularly with Green. We are conerned with whether or not cigarettes are reasonably t and wholesome for the use of the general public whom they are sold."

It was iterated and reiterated by the instructions at the sole factual issues were (1) whether cigattes are reasonably fit and wholesome for consumpon by the public and (2) if they are not, what were

sential cause of . . . any form of cancer. As a matter of fact are not even sure that cancer is a disease that has an essential use." (R. 328-329) (Cross). Dr. Heller: "It is a virtual impssibility to particularize upon a cause of any cancer in a single dividual" (R. 231) and "We do not know the reasons why cells olifcrate and become invasive cancers". (R. 234) (Cross). . Tate conceded that his position "boils down to" getting rid of arette smoke "until we find out the cause". (R. 390) (Cross).

plaintiffs' proven damages. This was exactly the issue upon which the case was remanded for trial.

There is simply no basis for the majority's conclusion that the admission of this testimony confused the jury "as to that which had already been determined to be a fact."[3]

II.

It would be harmful enough to this defendant, who has twice won this case before a jury, if the majority opinion stopped at the end of Part I. True, the parties would be put to the time, the trouble and the expense of yet another jury trial, but perhaps upon another trial on the issue directed to be tried by the earlier panel of this Court, the trial court could limit the testimony of the defendant's experts in a manner to fit the objections of the majority.

But, the majority opinion says, "the matter does not stop at this point". In Part II of the opinion, it reaches the conclusion, assertedly based on two Florida Su-

[3] The conclusion that the jury was confused is further refuted by footnote 14.5h of Frumer and Friedman's, Product's Liability, Vol. 2, §16.03[4], wherein the jury foreman on the second trial of the case was quoted as saying: '"'If we had to decide if cigarettes are safe, we would have said "no"'" Mr. Mucino, a 35-year-old savings and loan company executive, said.' But the judge told us specifically to decide if cigarettes are reasonably safe and wholesome for human consumption. We were told to assume Mr. Edwin M. Green died of cancer. *We didn't determine that. We decided the key word was "reasonable."* What is absolutely safe? For some people smoking is not safe; for others it is. Is 20 to 30 years reasonable? We decided it was.'"' New York Times, Nov. 30, 1964. (Emphasis added). This extrajudicial source reveals that the jury was anything but misled.

preme Court cases[1] decided since the certification proceedings, that there has occurred a material change in controlling legal principles since the decision of the prior panel on the first appeal of this case, 325 F.2d 673. On this predicate the trial court is directed to enter judgment n.o.v. as to liability and to limit the third trial to the sole issue of damages.

I fail to find any material change in Florida law by reason of *McLeod* and *Foley, supra*. Indeed, further post-*Green* pronouncements of the Florida Supreme Court point to a diametrically opposite conclusion, to be commented upon later in this dissent.

McLeod decided that two retail druggists were not liable under an implied warranty of fitness for dispensing in the manufacturer's original container upon physician's prescription a drug known as "Mer/29" (advertised as a commodity for controlling body cholesterol) to a customer who suffered injury from taking the drug as directed by the physician. The petitioner (plaintiff-customer below) contended that the advisory opinion in *Green v. The American Tobacco Co.*, 154 So.2d 169, sustained his position.

In disposing of this contention the Florida Supreme Court said:

> "There are several distinguishing elements. Green was a suit against a manufacturer. It involved a commodity which was

[1] *McLeod v. Merrill*, 174 So.2d 736 (1965); and *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (1965).

available indiscriminately to the public generally. Green can be summarized as a case which applied a rule of absolute or strict liability to the manufacturer of a commodity who had placed it in the channels of trade for consumption by the public generally. The case before us is lacking in many of these significant elements."

The language just quoted includes that quoted on page 7 of the majority opinion, and which is advanced at the top of page 17 of the opinion as categorically stating that Green applied the rule of absolute or strict liability to the situation now before us.

The majority seems to be captivated by the characterization in *McLeod* that *Green* "applied a rule of absolute or strict liability to the manufacturer of a commodity who had placed it in the channels of trade for consumption by the public generally". In *Green* the Florida Supreme Court did apply a rule of absolute or strict liability in the sense that it said that liability *did not depend upon knowledge or foreseeability of harmful effects*. This was the question before it. Nevertheless, as the prior panel in this case recognized it made clear that this absolute or strict standard was to be applied to *reasonable* fitness for consumption.

The portions of the *McLeod* opinion quoted by the majority standing alone and out of context may plausibly appear to support the holding of the major-

ity. However, immediately following the portion of *McLeod* quoted by the majority, we find further elaboration as to exactly what is involved in the *McLeod* case. The court stated: "In effect, the petitioner McLeod is asking us to impose upon these retail prescription druggists an absolute, strict liability *without fault* in an action in tort." (Emphasis added) 174 So.2d at 739. On the same page, while summarizing its holding, the court further added: "The concept of strict liability *without fault* should not be applied to the prescription druggists in the instant situation." (Emphasis added).

From the foregoing language, nothing could be clearer than that strict liability *without fault* is, and *has been*, well recognized by the Florida courts. *Cliett v. Lauderdale Biltmore Corp.*, 39 So.2d 476 (Fla. 1949); *Sencer v. Carl's Market*, 45 So.2d 671 (Fla. 1950). Where my brethren go astray is in equating the entirely separate concept of strict liability without fault with strict liability without regard to a product's reasonable fitness for consumption or use by the general public.

Foley, the other case relied upon by the majority, involved the implied warranty liability of a retail druggist for a defect in a container for reducing pills, known as "Thindown", the container being a glass bottle which closed with a screw-on top. The purchaser's wife attempted to open the bottle by unscrewing the top. The bottle broke, fragmented, and one piece lacerated her right wrist. The Florida Su-

preme Court took the case upon certiorari because the holding below that the plaintiffs had no cause of action against the retailer for breach of an implied warranty of fitness and merchantability was in direct conflict with *Canada Dry Bottling Co. v. Shaw,* 118 So.2d 840 (2d D.C.A. 1960), decided by the Second District Court of Appeal imposing liability upon both bottler and retailer. The case under review was approved and *Canada Dry* disapproved. *Foley,* therefore, stands for the proposition that as to defective containers causing injury Florida will not impose upon retailers liability for implied warranty of fitness. It decided nothing whatever with respect to liability of either manufacturer or retailer upon implied warranty with respect either to food or other product intended for human consumption. The Florida Supreme Court stated (*Foley,* page 227, 177 So.2d) that the exact question before it had not theretofore been presented to that court. It proceeded to discuss its prior holdings imposing liability upon both retailer-seller and manufacturer of foodstuffs sold in sealed containers for injuries caused by unwholesome or deleterious substances therein, citing *Blanton v. Cudahy,* 19 So.2d 313 (Fla. 1944) (manufacturer and packer of tinned meat), *Sencer v. Carl's Market,* 45 So.2d 671 (Fla. 1950) (retailer-seller of canned sardines), and *Cliett v. Lauderdale Biltmore Corp.,* 39 So.2d 476 (Fla. 1949) (unwholesome food served in dining room). It said that "as stated in the *Cliett* case, *supra,* and reaffirmed in *Sencer v. Carl's Market, supra,* 45 So.2d 671, 672", and then proceeded to set forth the language quoted by the majority at the bottom of page

17 of the majority opinion. The point here is that all these cases were before and discussed by the Florida Supreme Court when it answered our certified question at 154 So.2d 169. The *Blanton* case is quoted in footnote 7, on page 171, coupled with a citation to *Cliett*. The holding in *Sencer v. Carl's Market* is discussed extensively on page 171. By no interpretation, no matter how strained, could *Foley* logically or reasonably be viewed as a change in applicable Florida law when the portion of the opinion relied on by the majority is a quote from a Florida case decided eighteen years ago.

The references in *Foley* and *McLeod* to the holding of *Green* as establishing strict liability must be read in context. In these and other cases the reference to strict or absolute liability has reference *only* to the long followed concept that liability is imposed for *defective* products regardless of whether the defect could have been discovered by the manufacturer. This is a common use of terminology to distinguish between the negligence concept of fault as opposed to the implied warranty concept of liability regardless of fault. *Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla. 1961); *Cliett v. Lauderdale Biltmore Corp., supra;* and *Miami Coca Cola Bottling Co. v. Todd*, 101 So.2d 34 (Fla. 1958).

It is significant to me that neither in their original brief nor in their reply brief did the appellants, despite urging this Court to reverse the prior panel, refer in any way to either *McLeod* or *Foley*. To fur-

ther emphasize the radical interpretation the majority now places on *Foley*, we note that plaintiffs' counsel in the instant case were likewise counsel in *Foley*. Yet *Foley* was not cited or relied upon—nor even referred to—by plaintiffs until *after* this court requested supplemental briefs from counsel as to whether or not *McLeod* and *Foley* required that judgment n.o.v. be entered for the plaintiffs on liability. These are capable and experienced Florida lawyers, especially skilled in representation of plaintiffs in personal injury and death cases, including specifically cases involving products liability. It strains credulity to assume that their failure to cite *McLeod* and *Foley* originally was the product of oversight. Rather, the more logical conclusion is simply that *Foley* and *McLeod* were not relied upon by plaintiffs' counsel for the obvious reason that neither case stands for the proposition for which it is cited by my brethren. The theory that these two cases signal a departure by the Supreme Court of Florida from the advice given us at 154 So.2d 169 is completely original with the majority opinion in this case.

In substance, my position is that the majority has failed to recognize the uniqueness of the situation presented. We are not dealing with an obvious, harmful, foreign body in a product. Neither do we have an exploding or breaking bottle case wherein the defect is so obvious that it warrants no discussion. Instead, we have a product (cigarettes) that is in no way defective. They are exactly like all others of the particular brand and virtually the same as all other

brands on the market. The statement of Judge Goodrich, in a concurring opinion in *Pritchard v. Liggett and Myers Tobacco Co.*, 295 F.2d 292, 302 (3 Cir. 1961), is equally applicable here:

> "If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable *unless* (1) the manufacturer tells the customer the whiskey will not hurt him or (2) the whiskey is adulterated—made with methyl alcohol, for instance. The same is surely true of one who churns and sells butter to a customer who should be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer who should be on a no-salt diet. Surely if the butter and the peanuts are pure there is no liability if the cholesterol count rises dangerously." (Emphasis added).

It is significant to note that in the instant case there has never been even an attempt to prove either of the two above listed exceptions. Inability to prove a specific defect would not preclude liability if there was proof the product was unreasonably dangerous without a defect.

Even under the new strict liability in tort (as opposed to an action in warranty) theory found in Section 402A of the Restatement of Torts (Second), Comment i provides: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may

be harmful; but tobacco containing something like marijuana may be unreasonably dangerous."

On March 1, 1967, the Florida Supreme Court decided the case of *Community Blood Bank Inc. v. Russell,* 196 So.2d 115, and provided several indications as to the precise holding in *Green* and the state of the law in Florida. *Russell* involved the liability of a blood bank for blood sold containing the medically undetectable and unremovable serum hepatitis. In reviewing the action of the District Court of Appeal, the court cited *Green* with approval as authorizing remand "*for trial on issues of fact,*" (Emphasis supplied) 196 So.2d at 117. Such a recent pronouncement by the Florida Supreme Court in *Russell* that *Green* was properly remanded by the prior panel, certainly runs counter to the majority's decision that judgment should be entered for the plaintiffs on liability as a matter of law.

Justice Roberts of the Florida Supreme Court filed a specially concurring opinion in *Russell.* His views are interesting, though concededly not an expression binding the Court. In his special concurrence in *Russel* he indicates that to allow avoidance of liability because of inability to detect or remove the serum hepatitis "runs counter to the very basis of the strict or implied warranty theory of liability—that is, *liability without fault*—and is in direct conflict with the decision of this court in Green v. American Tobacco Co., supra, 154 So.2d 169." 196 So.2d at 119 (Emphasis added).

At another point Justice Roberts explained the court's holding in *McLeod* as follows: "[W]e held that the retail druggest could not be held liable on the theory of breach if[sic] implied warranty of merchantability where the drug supplied to the plaintiff was, in fact unadulterated." 196 So.2d at 120. It was Justice Roberts' observation that the key word was "unadulterated". To further explain, he added:

> "There is a clear distinction between a product which is not adulterated—one which meets all the standards established for a particular product but which is attended with a known risk to the consumer—and a product which is, in fact, adulterated and defective —that is, which does not meet the standards established for this particular product—and which would, because of such unknown and undetectable defect, produce a harmful effect upon *any* consumer thereof." 196 So.2d at 120 (Original emphasis).

Justice Roberts then concluded that *McLeod*, in which there was no liability, was distinguishable because there was no defect or adulteration, but that there should be liability in *Russell* because the blood was in fact adulterated or defective by virtue of the presence of the serum hepatitis albeit undetectable and unremovable.

If Justice Roberts' elaboration is taken as correct, and certainly nothing was said or decided in *Foley* or *McLeod* which in any way contradicts the above

quoted passage, then the Florida position on implied warranty is clearly one in which there has to first be an actual adulteration in the product before there can be liability from harm resulting from its use. Dean Prosser has reached the same conclusion, i.e., that "there is no strict liability when the product is fit to be sold and *reasonably safe for use*. . . ."[5] (Emphasis added).

It has been firmly established by the prior panel for purposes of this case that the cigarettes are not adulterated:

> "There has never been presented by the evidence any contention that Lucky Strike cigarettes were more dangerous or had a greater propensity to cause lung cancer than cigarettes bearing other brand names. Nor has there been any contention that the cigarettes which Mr. Green smoked contained any foreign substance, or any spoiled, contaminated or other substandard ingredient which caused his injury and death. Instead, plaintiffs' contention from the beginning has been that cigarettes—not Lucky Strike cigarettes alone—cause lung cancer." 325 F.2d at 676.

My research has not revealed any Florida decision finding a manufacturer liable in which there was not some defect or adulteration in the product.

[5] Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791, 812 (1966).

For the majority now to decide that proof of a defect or adulteration (or at least that the harmful effects of the product are felt by a substantial segment of the public) is no longer necessary, as a matter of law, goes far beyond anything yet decided or even foreshadowed in the Florida decisions.

One further source will be discussed relative to my position in this dissent, and that is the Florida Supreme Court's advisory opinion in this case. At the outset the Florida Supreme Court was careful to delineate what it was and was not called on to decide. The first pertinent portion of the opinion is as follows:

> "We conclude also that the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable[2] in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstances of this case." 154 So.2d 170.

Further on the court stated that it likewise was not called on to decide whether the product was reasonably fit and wholesome for its general purpose.

In footnote 2 to the preceding quotation, the Florida court refers to Section 25 of Frumer and Friedman, Products Liability, wherein cases are collected involving products whose contents are sufficiently

repulsive so as to require no proof of unwholesomeness. Such cases include those where the product contained mice, flies, slime, mud, bugs, roaches and worms. Little doubt exists that the presence of such articles in a product intended for human consumption renders said product unwholesome or unmerchantable as a matter of law.

The same footnote refers to Section 29.03[1] of Fruman and Friedman which the court noted discussed "the problem of individual reactions to ordinarily harmless substances", [the theory on which this case was tried the second time, after remand] "discussion of which we deem unwarranted here because of the lack of Florida precedent and the limited issue posed in this non-adversary proceeding."

Again, in footnote 11 the Florida Supreme Court quotes with approval Frumer and Friedman's analysis of a Wisconsin case to the effect that: '" 'What is to be *reasonably expected* by the consumer is a *jury question in most cases*; . . . This test as applied to an action for breach of the implied warranty is keyed to what is "*reasonably fit*" '" '. (Emphasis added)

The majority has relied at pages 4, 6 and 16 of the majority opinion on the "actual safety" language of the Florida Supreme Court as establishing liability. Such reliance is misplaced. If the construction by the majority is correct, American Tobacco has been made an insurer.

In my view what and all that is said about "actual safety" is that it is paramount to industry standards. The latter portion of the paragraph on page 173 of *Green* makes it clear that the Florida Supreme Court's references to the "actual safety" of a product were not intended to be construed as a modification of the test of whether a product is reasonably fit for human use and consumption.[6]

It is my opinion that the above mentioned guarded statements of the Florida Supreme Court as to what it was *not* called on to decide as well as the footnoted references to vitally important areas of products liability defense which were not to be discussed is a clear indication that the action of the prior panel in remanding for a new trial as to the cigarettes' reasonable fitness was eminently correct. Any other conclusion would be supported only if the Florida Supreme Court had clearly and affirmatively ruled that

[6] "The contention that the wholesomeness of a product should be determined on any standard other than its actual safety for human consumption, when supplied for that purpose, is a novel proposition in our law, and one which we are persuaded has no foundation in the decided cases. To hold that prevailing industry standards supplant the ordinary standard of objective truth and proof, and should be conclusive on the issue of a product's *reasonable fitness for human use or consumption,* would be to shift to the purchaser the risk of whatever latent defectiveness may ultimately be proven by experience and advancement of human knowledge, a risk which we are convinced was from the inception of the implied warranty doctrine intended to be attached to the mercantile function. There exists, we think, no real alternative and no valid objection to this distribution of the burden, if the public health is to be protected in any practical sense from exploitation by whose who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume." (Emphasis added) 154 So.2d at 173.

when the defendant's cigarettes caused the plaintiff's fatal cancer, as the first jury had found and of which the Florida Supreme Court was aware, the Lucky Strikes were unmerchantable as a matter of law. The Florida Supreme Court's decision in *Green* has never been criticized by that court. Nor has the Florida Supreme Court ever indicated that the prior panel of this court was incorrect in remanding for a new trial, limited to the question of whether Lucky Strikes were "reasonably fit and wholesome." Indeed, the Florida Supreme Court specifically approved of the remand in *Green* "for trial on issues of fact." *Community Blood Bank Inc. v. Russell*, *supra*.

A final supporting reference can be found in Fruman and Friedman, *supra*, Vol. 2, §16.03[4], p. 62, wherein the authors analyzed the Florida Supreme Court's opinion in *Green* and concluded that "Whatever the scope of the warranty, the tenor of the opinion is that it is at least *for [the] jury* to say whether cigarettes which cause cancer . . . are reasonably fit for human consumption, unfettered by limitation that [the] manufacturer does not warrant against unknowable risks." (Original emphasis) Even though the authors are not in accord with what they view as the Florida position, their conclusion that the issue of reasonable fitness is for the jury is at odds with the construction of the opinion by the majority of this panel, viz: that this issue should be decided as a matter of law.

Further, it should be emphasized, as set forth in the majority opinion of the prior panel. (325 F.2d 673, at page 676, under headnote 2) that the original jury was charged as follows:

> "The manufacturer of products which are offered for sale to the public in their original package for human consumption or use *impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold*, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge." (Emphasis supplied in original opinion)

Judge Rives then points out that this was taken verbatim from plaintiffs' requested written instruction No. 11 as to which the plaintiffs consented to the insertion of the adverb "reasonably" to modify "wholesome or fit", and that defendant did not object to the emphasized portion. Judge Rives continued: "As a part of the law of this case the parties are, therefore, bound by the *scope* of the implied warranty as so defined by the district court." (Emphasis mine.)

Thus, (1) on the first trial the district court and both parties recognized "reasonably wholesome or fit" as the scope of the implied warranty as the law of the case, (2) the Supreme Court of Florida recognized it as the scope of the implied warranty, (3) this

Court on the prior appeal specifically identified this concept as the law of the case, and directed the lower court to follow it on retrial, (4) upon retrial the lower court carefully followed directions, and (5) there has been no intervening change in the applicable Florida law. If there is such a thing as the "law of the case" *ever* being permanently and impregnably established, the series of events listed above should establish for all time and for all purposes *of this case* that the scope and nature of the implied warranty here is one of "reasonable wholesomeness and fitness for use by the public."

By a stroke of the majority's pen this consistent treatment of the question by the parties and by all the courts involved is obliterated from the record. It is as though what the record clearly shows did happen never happened at all. On the record before us, I cannot concur.

Respectfully, but vehemently, I dissent from the holding of both Part I and Part II of the majority opinion. I would affirm the trial court and write "FINIS" to this long and troublesome litigation.

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APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22435

MARY GREEN and EDWIN GREEN, JR.,
Appellants,

vs.

AMERICAN TOBACCO COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Before BROWN, Chief Judge, TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER*, SIMPSON and CLAYTON, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

*Judge Dyer has recused himself

IT IS ORDERED that the cause shall be reheard by the Court en banc. The Clerk will specify the briefing schedule.

Since this case has been the subject of an opinion by the Supreme Court of Florida and not less than three opinions of this Court (with two dissents) the Court has considerable doubt that any practical value exists for oral argument on a matter now so thoroughly explored on briefs and court opinions. The Court therefore prefers that, unless there is objection by the parties, the case be submitted on briefs without oral argument. The parties will be afforded ample opportunity to file new or supplemental briefs as desired.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22435

MARY GREEN and EDWIN GREEN, JR.,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

- - - - -

Appeal from the United States District Court for the Southern District of Florida

- - - - -

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, SIMPSON and CLAYTON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Order of this Court of March 25, 1968, ordering this cause reheard by the Court en banc is hereby modified, so as now to provide that this cause be reheard by the Court en banc on briefs and without oral argument.

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APPENDIX J

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22435

MARY GREEN,

Appellant,

versus

THE AMERICAN TOBACCO COMPANY,

Appellee.

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, deceased,

Appellant,

versus

THE AMERICAN TOBACCO COMPANY,

Appellee.

Consolidated appeals from the United States District Court for the Southern District of Florida

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(April 8, 1969)

ON PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: The Court sitting en banc recedes from and overrules the decision of the majority of the panel in this case.[1] Both Parts I and II of the opinion are overruled by the Court. We affirm the judgments of the lower court for the reasons and upon the principles set forth in Judge Simpson's dissent, 391 F.2d at 106.

AFFIRMED.

COLEMAN, Circuit Judge, with whom BROWN, Chief Judge, and GODBOLD, Circuit Judge, join, dissenting:

I respectfully dissent.

I do not propose to replay the long history of this litigation as compiled in this Court, in the District Court, and in the Supreme Court of Florida on certificate. A general resume may be found in the prior panel decision, 391 F.2d 97.

The one inescapable consideration is that a jury found as a fact that Mr. Edwin Green, Sr. died of primary cancer of the lung, caused from smoking Lucky Strike cigarettes. This finding was *affirmed by this Court*, 304 F.2d 70 (1962); 325 F.2d 673 (1963). The decisive point is that when a jury so *found* there simply remained no further strict liability factual issue in the case.

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[1] *Mary Green and Edwin Green, Jr. v. American Tobacco Company*, 391 F.2d 79, January 24, 1968.

This Court one time certified the case to the Supreme Court of Florida to settle a narrow question of Florida law. That Court responded. It later took occasion to state exactly what its reply stood for, to-wit, "*Green* can be summarized as a case which applied a rule of absolute or strict liability to the manufacturer of a commodity who had placed it in the channels of trade for consumption by the public generally", quoted in the prior opinion, 391 F.2d 101.

Yet, our Court, en banc, is now about to hold that he who sells for profit a product which caused the dread disease of cancer and also caused that ultimate of all dreads, death itself, can wiggle out of it by convincing a lay jury in a swearing match among super-scientists that such a product may somehow be reasonably safe for personal consumption by the general public. Because I do not believe that the Supreme Court of Florida would approve such a result, I persist in my refusal to do so.

The American Tobacco Company sold a product intended to be smoked. It contained an ingredient which caused cancer and death. The evidence shows that there was no way then, and there is none now, to foretell the identity of the person upon whom the fatal consequences will be visited. Yet, as happened to Mr. Green, *it is certain they will occur to some.* If one plays Russian Roulette with a revolver containing ten chambers but loaded with one bullet there may be only one chance in ten that he will be shot. I doubt, however, that this Court would hold that the practice raises a jury issue as to its reasonable fitness for

common use by the general public. Without resort to any court, the common sense of mankind teaches that such lethal games are inherently dangerous, even if some of the players do escape. The same must be true as to any deadly product. As to cancer-causing cigarettes, one must ask, how can anything, as a matter of fact, be reasonably fit for use by the general public when it is known to kill and no one knows whom it will kill?

If every user of the product is thus exposed to cancer and death, then how, as a fact, can it be reasonably fit - for one or for a million? The inquiry is not answered by proclaiming that a known killer failed to infect or to kill millions of others, who fortunately escaped its effects.

Any product for personal use, of whatever name or content, which causes cancer has no better claim to fitness as a fact than that accorded a poison. I think this Court should say so, and I am sorry that it believes otherwise. Yet, it seems quite clear that if we had a seller of canned meat before us he would get nowhere in an absolute liability case by claiming that only one container in a million contained poison and he is not liable since only a few people were killed. Why the legal distinction between a package of cigarettes and a can of meat? I submit that there is none.

Omitting repetitious discussion of the Florida cases cited in the panel opinion, 391 F.2d at 105, involving such products for human consumption as tinned meat, canned sardines, candy bars, soft drinks, and restau-

rant food, it is to be remembered that in none of these cases was it hinted that the seller might have avoided liability by proving that (while the plaintiffs were injured by the deleterious substance) numerous others suffered no injury from using or consuming it.

Our late Brother Cameron hit the nail on the head when he wrote, of this case, 304 F.2d 81, 82:

> "I think the Florida cases establish a rule of law which constitutes a condition of every sale of a product for human consumption or use, which has the same legal effect in this case as if appellee had entered into a written contract with decedent, covering every package of cigarettes purchased by him, couched in these words:
>
> "American guarantees that the cigarettes contained in this package are fit to be used by purchaser, a human being, by lighting and drawing smoke from them into the lungs, so that the ingredients of the cigarettes carried in the smoke may be deposited on the walls of the blood vessels situated therein, to the end that said ingredients will be absorbed into the blood stream and will produce in the smoker the soothing and relaxing sensations normally attending such use; that said cigarettes do not contain any harmful or deleterious substance; and that it will indemnify the user against any injury, loss or damage which

may result from the smoking of said cigarettes."

It is not to be overlooked that what the majority of the Court is doing here is to leave the law on the sale of cancer producing products to the divergent views of as many juries as may hereafter be empanelled on the subject. Yet, no court would ever do this if it were dealing with any other known poison, which, incidentally, a victim might have a chance to recover from.

With deference, I adhere to the result reached in the prior opinion. Upon the factual finding of the jury, I would hold American Tobacco Company liable as a matter of law and leave it to another jury to assess the damages. See 13 A.L.R. 3rd 1049 (1967).

I must likewise state my disagreement with the action of the Court, en banc, refusing to certify this question to the Supreme Court of Florida for a direct, specific ruling on the Florida law applicable to this situation. It will not be denied that in this diversity case we must apply state law. Federal courts do not make the law with reference to state questions but merely ascertain and apply it, *Huddleston v. Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1248; *Meridith v. City of Winter Haven, Florida*, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9; *Smithey v. St. Louis Southwestern Railway Co.*, 8 Cir., 1956, 237 F.2d 637; *Polk County, Georgia v. Lincoln National Life Insurance Co.*, 5 Cir., 1959, 262 F.2d 486.

While it may be argued that no further delay in the disposition of this long pending case should be tolerated, I would hold that at least in matters of cancer and health, life and death, we should give the Supreme Court of Florida an opportunity to settle the issue, especially since it is the only court which can do it with finality. I make no comment, beyond noticing it, that in this case a heavily docketed twelve judge court has been convened en banc to pass on an issue of state law in a diversity case, yet what we do can be reversed by the Supreme Court of Florida the next time it has the opportunity.

BROWN, Chief Judge, with whom COLEMAN and GODBOLD, Circuit Judges, join, dissenting:

I join unconditionally in the dissent of Judge Coleman. I would only add to it by emphasizing that — charged as we are with the duty to accept, try and pass on diversity cases — we are engaging in the wildest of guesses as to what the law of Florida is, or what the Supreme Court of Florida would say it is.

All of this adds up to the unfortunate consequence in this old, old case[1] of the failure to use properly and exploit fully the remarkable tool of certification to the Supreme Court of Florida. Indeed, it is still not too late.

Of course, certification was once had where, on rehearing of our initial decision,[2] we certified a ques-

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[1]The suit was filed over a decade ago in December 1957.
[2]Green v. American Tobacco Co., 5 Cir., 1962, 304 F.2d 70.

tion.[3] But the real trouble was that the question certified was too limited, too restrictive, too narrow.[4] The question stated zeroed in on only one phase — whether Florida law imposes on a manufacturer an absolute liability for death caused by using the product even though the manufacturer exercising reasonable human skill and foresight could not have anticipated its damaging effects.

The inadequacy of the certified question and the Florida Supreme Court's answer to it[5] was vividly recognized in our second opinion[6] after certification and answer. With the four jury interrogatory answers, F.R.Civ. P. 49 (b),[7] which we then held were binding on a retrial, and the Florida answer to the certification that strict liability would exist even though the dangers of the product could not have been known to the prudent manufacturer, we had to face up to the now controlling issue of Florida law: whether the cigarettes were, on the trial record, unmerchantable as a matter of law because they were not reasonably fit and wholesome for their intended use, that is, to be smoked. Without a doubt the first trial record raised that question. Indeed, following certification on our second decision we held[8] the evidence of causation more than ample. This evidence revealed the shocking medical opinion-fact that even with respect to "good" cigarettes — i.e., those manufactured in accordance

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[3]Green v. American Tobacco Co., 5 Cir., 1962, 304 F.2d 70, 85.

[4]It is set out in our decision, Green v. American Tobacco Co., 5 Cir., 1963, 325 F.2d 673, 674.

[5]Green v. American Tobacco Co., Fla., 1963, 154 So. 2d 169.

[6]Green v. American Tobacco Co., 5 Cir., 1963, 325 F.2d 673, 675-677.

[7]See 304 F.2d at 85-86.

[8]See 325 F.2d at 676-678.

with specifications and not "defective" from the presence of foreign matter — "the major factor that produces lung cancers in American males is smoking" and that "one in nine or ten" smokers does develop lung cancer. 325 F.2d 673, 676-78.

It remains the mystery wrapped in an enigma why we did not recertify an appropriate question to decide the issue that took a second expensive trial and a third expensive appeal, which produced a third decision[9] that is now supplanted by yet a fourth decision — the present opinion on rehearing en banc.

We know one thing for sure: no one knows just what the Supreme Court of Florida would say[10] about

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[9]Green v. American Tobacco Co., 5 Cir., 1968, 391 F.2d 97.

[10]Judge Gewin has described this quest in Stool v. J. C. Penney Co., 5 Cir., 1968, 404 F.2d 562:

> "We therefore fall back on formulary surrogates to account for our mysterious application of an uncoined code. Thus where the controlling state law eludes the researcher, the court must attempt to ascertain the policy inclination of the state's highest tribunal with regard to the matter in controversy."
>
> * * *
>
> "It is nevertheless patent that any rule which we vicariously adopt on behalf of the state courts will be substantially the product of conjecture. Accordingly, we are hesitant to attempt to second-guess the district court which has already ventured intrepidly into the phantom-law wonderland. Since our view of the state law is probably as much a guess as the district court's, the latter cannot be designated categorically as wrong. Ironically enough, however, the district court can be erroneous. We cannot accept the premise that one guess is as good as another, for that would effectively eliminate appellate review in a substantial portion of the cases which come before this court."
>
> 404 F.2d at 563 (footnotes omitted).

the wholesomeness of a product that in one out of ten users brings about the dreaded cancer. Of course Florida has a great stake in fashioning the products liability standards as a sanction to a strong judicial policy of protecting Floridians from the consequences of products of such portent.

Florida accepts without resistance or reluctance the now numerous cases we certify, and, as happened in this case,[11] its answers often demonstrate that we had indeed guessed incorrectly.[12] With this court so divided,[13] the minimum that should be done is to certify this now critical question to the Florida Supreme Court just as was done in effect by the Supreme Court's summary reversal of *Kaiser Steel*, supra (note 12). Florida has the right to determine for its ever increasing millions and for the millions of much coveted perennial visitors whether a product that dooms one in ten to the terrible disease can ever be fit or wholesome, reasonably or otherwise.

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[11]Judge Rives in a wholesome exercise of self confession in the second opinion, 325 F.2d 673, 674, stated that the Florida answer "has saved this court, through the writer as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice."

[12]See W. S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1963, 388 F.2d 257, 264, n. 15, (dissenting opinion), *reversed*, 1968, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed. 2d 835; Martinez v. Rodriquez, 5 Cir., 1968, 394 F.2d 156, 157 n. 2; Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F.2d 347, which produced two divergent Florida opinions, 201 So. 2d 743, *on rehearing*, 201 So. 2d 749.

[13]Judge Cameron dissented in the first two decisions, 304 F.2d 70, 77; 325 F.2d 673, 679. On the third appeal, Judges Coleman and Orie Phillips, Senior Judge of the Tenth Circuit found themselves in disagreement with Judge Simpson's momentary dissent. And now several others join the split.

Only one further thing need be mentioned to placate those "pedagogical purists", *Kaiser Steel,* supra, 388 F.2d at 267 whose theme is a mixture of the worn-out claims that to decide and decide now is more important than to decide correctly, and that certification and other abstention devices are too time consuming and destine a case to an interminable career.

The fact is that in neither *Hopkins* nor *Martinez* (See note 12, supra) was the period of gestation from certification to answer nearly as long as the delay which this case has encountered in the course of its history in the federal courts.

My position, then, is a dual one. First I reject the idea that the enlightened Supreme Court of Florida will tolerate a commercial system that sells with impunity ostensibly innocuous products, but which in fact have lethal consequences.

Second, the question is so vital to Florida that the State should be given the opportunity to fashion its own policy standard through the available, workable mechanism of certification.

On all scores I therefore dissent.

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,435

MARY GREEN,

Appellant,

versus

THE AMERICAN TOBACCO COMPANY,

Appellee.

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, deceased,

Appellant,

versus

THE AMERICAN TOBACCO COMPANY,

Appellee.

Consolidated appeals from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING
(July 7, 1969)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, SIMPSON and MORGAN, Cirsuit Judges.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

Coleman, Circuit Judge, I respectfully dissent.

APPENDIX L

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1968

No. 22435

D. C. Docket Nos. 8070 and 8505-Civil Actions

MARY GREEN,
Appellant,

versus

THE AMERICAN TOBACCO COMPANY,
Appellee.

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, deceased,
Appellant,

versus

THE AMERICAN TOBACCO COMPANY,
Appellee.

Consolidated Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, SIMPSON and MORGAN, Circuit Judges.

J U D G M E N T
ON REHEARING

This cause came on to be heard on rehearing en banc, and was taken under submission by

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

BROWN, Chief Judge, with whom COLEMAN and GODBOLD, Circuit Judges, join, dissents.

April 8, 1969

Issued as Mandate: Jul. 25, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 908

EDWIN GREEN, JR., as Administrator of the Estate of EDWIN GREEN, Deceased,

Petitioner,

—v.—

THE AMERICAN TOBACCO COMPANY,

Respondent.

MARY GREEN,

Petitioner,

—v.—

THE AMERICAN TOBACCO COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

A. LEE BRADFORD
101 East Flagler Street
Miami, Florida 33131

JANET C. BROWN
25 Broadway
New York, N. Y. 10004

ABE KRASH
1229 19th Street, N.W.
Washington, D. C. 20006

Counsel for Respondent

Of Counsel:

DIXON, DEJARNETTE,
BRADFORD, WILLIAMS,
McKAY & KIMBRELL
Miami, Florida.

EDWARD C. McLEAN, JR.
CHADBOURNE, PARKE,
WHITESIDE & WOLFF
New York, N. Y.

EUGENE R. ANDERSON
New York, N. Y.

JEROME I. CHAPMAN
ARNOLD & PORTER
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 908

EDWIN GREEN, JR., as Administrator of the Estate of EDWIN GREEN, Deceased,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY,

Respondent.

MARY GREEN,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals on rehearing *en banc* is reported at 409 F.2d 1166. Earlier opinions in this case are reported at 304 F.2d 70; 304 F.2d 85; 154 So.2d 169 (Fla. 1962); 325 F.2d 673; and 391 F.2d 97.

Statute Involved

Section 25.031, Fla. Stat. Ann. (1961 ed.) provides as follows:

> "The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

Rule 4.61 of the Florida Appellate Rules, which implements this statute, is quoted in the petition (pp. 6-8).

Questions Presented

On the first appeal of this case in 1963, the Court of Appeals ruled that under Florida law a manufacturer impliedly warrants that "its products are reasonably wholesome or fit." This definition of implied warranty had been agreed to by the parties at the first trial; it was recognized as the applicable definition by the Florida Supreme Court in its advisory opinion in this case; and it was the defi-

nition followed by the trial court and the parties at the second trial. The following questions are presented in light of the foregoing circumstances:

1. Whether the Court of Appeals *en banc*—following the law of this case as thus established—correctly concluded that no reason existed to depart from this definition of Florida law.

2. Whether the Court of Appeals *en banc* abused its discretion when it concluded that this case presented no question for a second certification to the Supreme Court of Florida.

3. Whether various alleged errors in the trial court's instructions and rulings on evidence, considered and rejected by the Court of Appeals *en banc,* warrant further review by this Court.

Statement

Summary Statement

This diversity case involves a claimed breach of implied warranty under Florida common law. At the first trial, the jury returned general verdicts for defendant-respondent* of no liability. On appeal, and following certification to the Supreme Court of Florida, the Court of Appeals ordered a partial retrial on liability and damages. On the retrial, a second jury again returned general verdicts for respondent. The petition seeks review of a decision by the

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* Petitioners were plaintiffs below and are herein referred to as "petitioners." Respondent was defendant below and is herein referred to as "respondent." References to "Pet. App." are to the Appendix to Petition filed by petitioners herein. References to "R." are to the certified transcript filed by petitioners.

Court of Appeals for the Fifth Circuit, sitting *en banc,* which affirmed the latest judgments for respondent. The Court below concluded that no reason existed to depart from the definition of the applicable implied warranty established by the Court of Appeals at an earlier stage of this proceeding, consistently followed by the parties in both trials of these actions, and confirmed by the Florida Supreme Court in an advisory opinion obtained in 1963 pursuant to the Florida certification Statute and Rule.

The protracted proceedings in this case are more fully described below.

(i) The First Trial and Appeal

Edwin M. Green instituted this diversity action in December 1957, in the United States District Court for the Southern District of Florida against respondent, The American Tobacco Company, alleging that he had incurred lung cancer as a result of smoking respondent's "Lucky Strike" cigarettes, and seeking recovery on various theories of liability including breach of implied warranty.* Green died after the complaint was filed, and the present petitioners in these consolidated actions are his administrator and widow.

The definition of the applicable implied warranty was agreed to by the parties at the first trial of this action in July 1960. The trial court charged the jury that under Florida law a manufacturer "impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold" (325 F.2d at 676; Pet. App. 48a). This instruction, as the Court of Appeals later noted, "was

* All of the other alleged theories of liability were long since finally resolved against petitioners and are not involved here.

taken verbatim from plaintiffs' requested written charge, . . . the plaintiffs [having] consented to the insertion of the adverb 'reasonably' to modify 'wholesome or fit'" (325 F.2d at 676; Pet. App. 49a).

The trial court also charged the jury that "such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge" (325 F.2d at 676; Pet. App. 48a-49a). The case was submitted to the jury for its general verdicts and, in addition, the trial court submitted four written interrogatories pursuant to Rule 49(b), F.R.C.P., which "were not intended to cover each and every issue of fact" but only *"certain factual matters* that have occurred in this trial" (325 F.2d at 677; Pet. App. 51a; emphasis the Court's). No interrogatory was submitted covering the "reasonable fitness" issue.

The jury returned general verdicts for respondent. In response to the written interrogatories it said that (i) Green had primary lung cancer; (ii) the cancer was "the cause or one of the causes of his death"; (iii) smoking respondent's cigarettes was "a proximate cause or one of the proximate causes" of the cancer; and (iv) respondent could not have known "by the reasonable application of human skill or foresight" that smokers of its cigarettes were in danger of contracting lung cancer (304 F.2d at 71-72; Pet. App. 2a-3a).

On appeal, the Court of Appeals (Rives and Bell; Cameron dissenting) affirmed the judgments for respondent. The Court rejected petitioners' contention they were entitled to a directed judgment as to liability on the basis of the answers to the first three interrogatories (304 F.2d 70,

72-73 (1962); Pet. App. 3a-5a). Upon plaintiffs' petition for rehearing, the Court certified to the Florida Supreme Court the question of whether respondent's knowledge or opportunity for knowledge of the alleged hazard was relevant (304 F.2d at 85; Pet. App. 33a).

(ii) The Florida Supreme Court's Advisory Opinion and Subsequent Disposition by the Court of Appeals

Upon certification, the Florida Supreme Court ruled in June 1963, that under Florida law a manufacturer's "actual knowledge or opportunity for knowledge" is "wholly irrelevant to his liability on the theory of implied warranty" (154 So.2d 169, 170-71 (1963); Pet. App. 36a, 38a). The Florida court recognized that the warranty "involved in the instant case" was the "ordinary merchantability warranty" that a "product supplied for human consumption shall be reasonably fit and wholesome for that general purpose" (*id.* at 171, 172; Pet. App. 38a, 40a). This was the same definition to which the parties themselves had agreed at the first trial (*supra,* p. 4).

Following the advisory opinion, the Court of Appeals vacated the judgments for respondent in December 1963, on the ground that the jury had been erroneously instructed as to the relevance of respondent's knowledge or opportunity for knowledge (325 F.2d 673; Pet. App. 44a).

Petitioners had renewed their claim that they were entitled to directed judgments on the issue of liability based on the answers to the first three interrogatories, and they urged that the case be remanded solely for a determination of damages. The Court of Appeals rejected this contention. The Court noted the references by the Florida court to "the implied warranty that a product supplied for human con-

sumption shall be reasonably fit and wholesome for that general purpose," and concluded that was "a correct definition of the scope of the implied warranty under the law of Florida" as well as "the definition by which the parties are bound as a part of the law of this case" (325 F.2d at 675-76; Pet. App. 47a-48a).

The Court of Appeals held that a partial new trial was necessary because "the jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were *'reasonably* fit and wholesome' " (325 F.2d at 677; Pet. App. 50a; emphasis the Court's). It remanded the case for a new trial on this issue. It directed that on the second trial the parties would be bound by the first jury's answers to the first three interrogatories (325 F.2d at 679; Pet. App. 55a).

(iii) Prior Petitions for Certiorari

Respondent filed a petition for writ of certiorari, and petitioners cross petitioned asking for entry of judgments on the liability issue, but they did not seek any further certification to the Florida Supreme Court. This Court denied both petitions in May 1964 (377 U.S. 943).

(iv) The Second Trial

The second trial was marked by sharp disagreement among expert witnesses. Petitioners sought to convince the jury that respondent's cigarettes were not reasonably fit and wholesome on the basis of expert testimony that smoking any kind of cigarettes causes lung cancer in a sizeable part of the smoking population.* Experts called by

* As the Court of Appeals pointed out: "There has never been presented by the evidence any contention that Lucky Strike ciga-

respondent—specialists in the fields of pathology, thoracic surgery, chest diseases, cancer research, pharmacology and biochemistry as well as statistics—controverted this testimony in every respect.

At the outset and throughout the trial, the trial court repeatedly charged the jury with respect to the prior jury's finding as to the cause of Green's lung cancer and told the jury it was to determine the "reasonable fitness" of the product "under all the circumstances" (e.g., R. Vol. VII 149, 151-152, 467, 525, 540; Vol. VIII 561, 563, 584, 949, 963, 972).* The jury was instructed on the implied warranty issue precisely in conformity with the directive of the Court of Appeals (R. Vol. VIII 970-995). This second jury returned general verdicts for respondent in November 1964.

(v) The Second Appeal

On appeal, petitioners contended the trial court erred (a) in excluding certain kinds of evidence; (b) in giving a "supplemental charge" to the jury; (c) in denying petitioners' motion for a directed verdict; and (d) in permitting some of respondent's expert witnesses to testify that they did not know the cause of lung cancer.

The panel (Judges Coleman and Simpson, and Judge Phillips of the 10th Circuit sitting by designation) dismissed the first three contentions as "minor matters," but

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rettes were more dangerous or had a greater propensity to cause lung cancer than cigarettes bearing other brand names. Nor has there been any contention that the cigarettes which Mr. Green smoked contained any foreign substance or any spoiled, contaminated or other substandard ingredient which caused his injury and death. Instead, plaintiffs' contention from the beginning has been that cigarettes—not Lucky Strike cigarettes alone—cause lung cancer" (325 F.2d at 676; Pet. App. 48a).

* From the outset petitioners themselves had agreed this was the issue to be determined at the second trial (R. Vol. VII 149, 151-154).

Judges Coleman and Phillips agreed with the fourth contention and ruled that the judgment should be reversed (391 F.2d 97, 101-104; Pet. App. 66a, 74a-83a). Judge Simpson dissented, finding no reversible error had been committed in the admission of such testimony (391 F.2d at 106-107; Pet. App. 88a-90a).

The panel rejected petitioners' argument that the trial court should have directed verdicts, recognizing that it could not properly "overrule the prior decision [of the Court of Appeals] which constituted the law of the case" on the implied warranty issue (391 F.2d at 102-103; Pet. App. 77a). The Court stated that "the District Court had to retry the case under the directions he had received from this Court" and that a jury question had been presented "as of the date of that particular trial" (*ibid.*).

The majority went on to hold, however, that in their view the Florida law had changed subsequent to the second trial, and that the applicable warranty was no longer defined in terms of a product's "reasonable fitness." They directed judgments for petitioners on the issue of liability based on the jury's answers to interrogatories at the first trial and remanded the case for a trial limited to damages (391 F.2d at 106; Pet. App. 87a).

Judge Simpson—the only Florida judge on the panel—dissented, concluding after a detailed analysis that there had been no intervening change in Florida law, that the panel majority had disregarded settled principles of "law of the case," and that it had improperly overruled the controlling decision of the prior panel of the Court of Appeals (391 F.2d at 106; Pet. App. 87a).

Judge Simpson emphasized that the "reasonable fitness" definition had not only been followed by the parties at both trials but also had been confirmed as correct by both

the Court of Appeals and the Florida Supreme Court. He therefore concluded (391 F.2d at 113; Pet. App. 106a):

> "If there is such a thing as the 'law of the case' ever being permanently and impregnably established, the series of events listed above should establish for all time and for all purposes of this case that the scope and nature of the implied warranty here is one of 'reasonable wholesomeness and fitness for use by the public.'"
>
> "By a stroke of the majority's pen this consistent treatment of the question by the parties and by all the courts involved is obliterated from the record. It is as though what the record clearly shows did happen never happened at all. On the record before us, I cannot concur."

(vi) The *En Banc* Decision

A motion by respondent for rehearing *en banc* was granted, and after further briefs* by both sides the Court of Appeals *en banc,* by a vote of 8 to 3, receded from and overruled the decision of the panel majority, adopted the views previously expressed by Judge Simpson and affirmed the judgments for respondent (409 F.2d 1166; Pet. App. 110a).

The three dissenting judges stated that in their view petitioners were entitled to judgments on the liability issue under Florida implied warranty law and that the ques-

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* After the petition for rehearing *en banc* was filed, the Court clerk requested both parties to submit copies of all prior briefs in this case for use by the Court in considering the petition; these were supplied and, in addition, after rehearing was granted, both sides submitted new briefs to the Court *en banc* and petitioners submitted a reply brief as well.

tion whether the cigarettes were unmerchantable as a matter of law should have been certified to the Florida Supreme Court (409 F.2d 1166-1170; Pet. App. 111a-120a).

Petitioners' subsequent petition for further rehearing, in which they urged for the first time that there should be a second certification to the Florida Supreme Court, was denied by the Court *en banc* by a vote of 10 to 1 (Pet. App. 121a).

ARGUMENT

1. There Is No Conflict With Florida Law

Petitioners first seek review of the determination that "reasonably fit and wholesome" is the definition of implied warranty under Florida law applicable in this case. This local law question presents no issue warranting review by this Court.

The critical facts are as follows:

(i) At the first trial, petitioners and respondent both recognized and the District Court charged the jury that the applicable warranty was that respondent's product be "reasonably fit and wholesome" (*supra*, pp. 4-5).

(ii) In its advisory opinion, the Florida Supreme Court recognized that the warranty "involved in the instant case" was "the ordinary merchantability warranty" that a "product supplied for human consumption shall be reasonably fit and wholesome for that general purpose" (*supra*, p. 6).

(iii) The Court of Appeals, immediately following this advisory opinion, ruled this was "a correct definition of

the scope of the implied warranty under the law of Florida" as well as "the definition by which the parties are bound as a part of the law of this case" (*supra*, p. 7).

(iv) At the second trial, the District Court charged the jury in conformity with the directive of the Court of Appeals that this was the applicable warranty and the jury's general verdicts resolved the conflicting evidence on the reasonable fitness issue in respondent's favor (*supra*, pp. 7-8).

(v) The panel which heard the second appeal unanimously recognized that this definition constituted the law of the case. The only basis on which Judges Coleman and Phillips concluded they could disregard the prior ruling of the Court of Appeals on this point was that there had been a change since December 1963 in the Florida law of implied warranty. They relied for this conclusion on two Florida decisions: *McLeod* v. *W. S. Merrill Co., Division of Richardson-Merrill, Inc.*, 174 So.2d 736 (1965), and *Foley* v. *Weaver Drugs, Inc.*, 177 So.2d 221 (1965).

As demonstrated by Judge Simpson, neither *McLeod* nor *Foley* effected any change in the Florida law of implied warranty (391 F.2d at 108-111; Pet. App. 91a-103a). Petitioners themselves never contended the state law had changed (391 F.2d at 109-110; Pet. App. 95a-96a), and avoid a clear endorsement of that position here (Pet. 23-24).* Further, those judges who dissented from the

* Petitioners cite Florida cases both before and after the advisory opinion which discuss "absolute" or "strict" liability and argue that to recover they need only prove the product caused an injury (Pet. 22-23). But, as Judge Simpson noted (391 F.2d at 109; Pet. App. 95a), in context these terms are merely used in Florida "to distinguish between the negligence concept of fault as opposed to the implied warranty concept of liability regardless of fault," and reflect the rule that a manufacturer's lack of knowledge is no defense to a claim for breach of implied warranty.

en banc opinion below, including Judge Coleman, did not base their dissent on any purported change in Florida law.

Petitioners do not cite any Florida case on this subject which was not thoroughly considered below. Many Florida cases subsequent to the certification opinion in 1963 (a) reiterate that "reasonable fitness" is the applicable standard;* (b) emphasize that this issue presents "a factual question for the jury"** and (c) conclude that this standard "does not contemplate that a manufacturer should be made the insurer for *all* physical injuries caused by his products."† If petitioners' contrary theory were correct, the Florida Supreme Court could easily have said so in its advisory opinion. It did not do so, and later took occasion in *Community Blood Bank, Inc.* v. *Russell,* 196 So.2d 115 (Fla. 1967), to cite *"Green* with approval as authorizing remand *'for trial on issues of fact'"* (391 F.2d at 110; Pet. App. 98a; emphasis the Court's).

In these circumstances, the Court *en banc* was clearly correct in its interpretation of Florida law and in adhering to the law of this case as a matter of "orderly judicial action." E.g., *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Co.,* 329 U.S. 607, 612 (1947); *Lincoln National Life Insurance Co.* v. *Roosth,* 306 F.2d 110, 113 (5 Cir. 1962), *cert. denied,* 372 U.S. 912 (1963).

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* E.g., *Zabner* v. *Howard Johnson's, Inc.,* 201 So.2d 824, 827 (Fla. App. 1967); *Wisner* v. *Goodyear Tire & Rubber Co.,* 167 So.2d 254, 255 (Fla. App. 1964).

** E.g., *Gates & Sons, Inc.* v. *Brock,* 199 So.2d 291, 294 (Fla. App. 1967).

† E.g., *Royal* v. *Black & Decker Mfg. Co.,* 205 So.2d 307, 309 (Fla. App. 1967; emphasis the Court's).

This Court has repeatedly made clear that it "ordinarily accepts the determination of state law as found by the Court of Appeals; particularly where, as here, the same finding is made by the District Court . . ." and that certiorari will not be granted simply to review such a determination. *Appalachian Power Co.* v. *American Institute of Certified Public Accountants,* 80 Sup. Ct. 16, 18 (1959) (application for stay of mandate to Brennan, J.), *cert. denied,* 361 U.S. 887 (1959); *In re Woods,* 143 U.S. 202 (1892); *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949); *General Box Co.* v. *United States,* 351 U.S. 159, 165 (1956); *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U.S. 456, 462 (1967). No reason exists here to depart from this well-settled rule.

2. The Case Presents No Question for Further Certification to the Florida Supreme Court

Petitioners contend the Court of Appeals "should have certified the entire case at bar" to the Florida Supreme Court. We submit that petitioners misconceive the nature of the certification procedure and have not demonstrated that the Court of Appeals abused its discretion in declining further certification.

First, absent "exceptional circumstances" it is "the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment." E.g., *Meredith* v. *Winter Haven,* 320 U.S. 228, 234-35 (1943). Certification is a procedure reserved for resolution of exceptional and important issues. Thus, this Court has held the certification procedure should be invoked if important constitutional questions would otherwise be presented, or if issues relating to the jurisdiction of this Court require clarification.

Contrast with the present case *Clay* v. *Sun Insurance Office Limited*, 363 U.S. 207 (1960); *Dresner* v. *City of Tallahassee*, 375 U.S. 136 (1963); and *Aldrich* v. *Aldrich*, 375 U.S. 249 (1963).

The Court of Appeals has shown no reluctance to utilize the Florida certification procedure in appropriate cases but it has declined to do so where the issue "is neither intricate enough nor repetitive enough to warrant a *Clay* type referral to the Supreme Court of Florida." *Motor Vehicle Cas. Co.* v. *Atlantic National Ins. Co.*, 374 F.2d 601,.602 n. 1 (5 Cir. 1967); see also, *Hamilton* v. *Maryland Cas. Co.*, 368 F.2d 768 (5 Cir. 1966); *Greer* v. *Associated Indem. Corp.*, 371 F.2d 29 (5 Cir. 1967). Here petitioners themselves told the Court *en banc* that the instant case was important only to the immediate parties and "will obviously have severely limited value as a precedent." *Brief for Appellants Following Granting of Rehearing En Banc*, p. 35.*

Petitioners' reliance upon *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968) is misplaced (Pet. 30). In that case, this Court ruled that the Court of Appeals for the 10th Circuit should abstain from deciding a point of New Mexico law pending decision on the same issue involving the same parties by the New Mexico state courts. This Court emphasized that the state law issue involved

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* Significantly, too, petitioners did not tell the Court of Appeals in 1963 that the questions which they now seek to have certified should have been certified to the Florida Supreme Court and their subsequent cross petition for writ of certiorari took no such position (*supra*, p. 7). In these circumstances, we submit that petitioners' belated demand for recertification is untimely. See, e.g., *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 30-32 (1961), in which this Court held a party had "abandoned its claim of error . . . by failing to raise that question in its previous petition for certiorari here" (367 U.S. at 32).

in *Kaiser*—eminent domain with respect to water rights—was "of vital concern" to New Mexico and was "truly novel" (391 U.S. at 594). The New Mexico Attorney General interceded and urged abstention (388 F.2d at 266 n. 17), and this Court stressed the need for applying the same rule of law with an even hand "to all other businesses and landowners concerned" (391 U.S. at 594).

The present case is not remotely parallel in these respects to *Kaiser*. No "truly novel" legal issue of "vital concern" can be said to exist merely because of conflicting opinions among expert witnesses. Juries, not courts, must resolve such conflicts and the jury resolved this case on its own particular facts.* E.g., *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

Second, the Florida certification Statute and Rule do not contemplate, as petitioners urge, that "the entire case" can be certified. Nor do they contemplate that the Florida Court can decide which party should prevail on the merits.** Petitioners' plea for further certification amounts to no more than a plea to transfer jurisdiction of this

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* The dissenting opinions of Judges Brown and Coleman below thus erred in assuming a certifiable question of law could be framed based on selected statistical testimony of petitioners' experts which failed to withstand cross-examination, was contradicted by respondent's experts and presented a question of fact resolved by the jury in respondent's favor.

** Only "questions or propositions of the laws of this state" may be certified (*supra,* p. 2). See also Rule 4.6 of the Florida Appellate Rules permitting certification of "questions or propositions of law" by intermediate state courts to the Florida Supreme Court, and the latter's consistent refusal to answer questions of fact or decide the whole case. E.g., *Jaworski* v. *City of Opa-Locka,* 149 So.2d 33 (Fla. 1963); *Dade County* v. *Philbrick,* 162 So.2d 266 (Fla. 1964); *Schwob Co.* v. *Florida Industrial Commission,* 11 So.2d 782 (Fla. 1942). See also this Court's practice under Rules 28 and 29 on certification of legal questions from courts of appeals or the Court of Claims. E.g., *Cross* v. *Evans,* 167 U.S. 60 (1897); *Warner* v. *New Orleans,* 167 U.S. 467 (1897); *Del Monte Min. Co.* v. *Last Chance Min. Co.,* 171 U.S. 55 (1898); *Pfleuger* v. *Sherman,* 293 U.S. 55 (1934).

case, by the certification route, from the federal court to the state court. However, petitioners invoked the jurisdiction of the federal courts; they were content in 1963 to retry this case without asking the Court of Appeals to solicit further advice from the state court; and having lost, they should not at this late date be permitted to frustrate the jurisdiction of the federal courts over diversity cases and to undo all that has gone before in this lengthy proceeding.*

3. The Trial Court's Instructions and Evidentiary Rulings at the Second Trial Present No Question for Review by This Court

No issue warranting review by this Court is presented by petitioners' claims that the Seventh Amendment was violated by reason of certain evidentiary rulings by the trial court and its "supplemental charge." All of these claims, save one, were dismissed as "minor matters" even by the two judges of the panel who voted to reverse the judgments for respondent (391 F.2d at 102; Pet. App. 75a).

The only other alleged error cited by petitioners was the admission of certain testimony by respondent's experts that they did not know the cause of lung cancer (*supra*, p. 8). The Court *en banc* carefully considered this alleged error and concluded, per Judge Simpson, that (a) this line of testimony "was opened up by and in direct response to testimony by the plaintiffs' experts"; (b)

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* In no event could the federal court, let alone the Florida Supreme Court, properly enter judgments for petitioners on the liability issue (Pet. 26) on the basis of the first jury's answers to interrogatories pursuant to Rule 49(b) F.R.C.P. That Rule permits such a judgment only when "the answers are consistent with each other but one or more is inconsistent with the general verdict." No such inconsistency occurred here.

"*plaintiffs'* expert witnesses testified either on direct or cross-examination to similar lack of knowledge as to the cause of cancer"; and (c) there was no basis on which to conclude "that the admission of this testimony confused the jury 'as to that which had already been determined to be a fact'" (391 F.2d at 106-107; Pet. App. 88a-90a; emphasis the Court's).

In sum, the decision of the Court of Appeals *en banc* is clearly correct. Two juries have returned verdicts for respondent in the instant case. The Court of Appeals has three times rejected the contentions as to implied warranty advanced by petitioners. The questions now tendered do not raise serious recurring issues of substance which merit review by this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

A. LEE BRADFORD
101 East Flagler Street
Miami, Florida 33131

JANET C. BROWN
25 Broadway
New York, N. Y. 10004

ABE KRASH
1229 19th Street, N.W.
Washington, D. C. 20006

Counsel for Respondent

Of Counsel:

DIXON, DEJARNETTE,
BRADFORD, WILLIAMS,
MCKAY & KIMBRELL
Miami, Florida.

EDWARD C. MCLEAN, JR.
CHADBOURNE, PARKE,
WHITESIDE & WOLFF
New York, N. Y.

EUGENE R. ANDERSON
New York, N. Y.

JEROME I. CHAPMAN
ARNOLD & PORTER
Washington, D. C.

Dated: February 2, 1970

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent in Opposition to the Petition for a Writ of Certiorari was served by mail this 2nd day of February, 1970 upon Lawrence V. Hastings and Irma Robbins Feder, 312 Biscayne Building, Miami, Florida 33130, counsel of record for petitioners herein, by depositing the same in a United States mail box at 25 Broadway, New York, N. Y. 10004 in a wrapper addressed to each of said counsel as aforesaid with sufficient airmail postage prepaid.

JANET C. BROWN
Counsel for Respondent

Dated: February 2, 1970

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Supreme Court

of the

United States

OCTOBER TERM, 1969

No. 908

MARY GREEN and EDWIN GREEN, JR.,
As Administrator of the Estate of
EDWIN GREEN, Deceased,
Petitioners,

vs.

THE AMERICAN TOBACCO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

LAWRENCE V. HASTINGS
IRMA ROBBINS FEDER
Attorneys for Petitioners
312 Biscayne Building
Miami, Florida 33130

MIAMI REVIEW — 371-4853 — 377-3721

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REPLY ARGUMENT [1]

I.

THE DECISION BELOW IN THE DIVERSITY CASE AT BAR CONFLICTS WITH FLORIDA IMPLIED WARRANTY LAW AS SET FORTH BY THE FLORIDA SUPREME COURT

Respondent's Brief does not address itself to the conflicts between the decision and opinion below and Florida Supreme Court implied warranty case-law set forth in the Petition at pp. 19-25 (and not repeated herein).

Instead, respondent-American Tobacco Company takes the position that "reasonably fit and wholesome" is the "correct definition" of the implied warranty involved and that the question of "reasonable fitness" is always a factual one for jury determination. Respondent's Brief (p. 13) cites four cases, Zabner v. Howard Johnson's Inc.,

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1/ "Pet." symbolizes the Petition for Writ of Certiorari, "App." the Appendix to the Petition, "C.T." the Certified Transcript, and "B.R." respondent's Brief in Opposition.

Fla. App. 1967, 201 So.2d. 824, Wisner v. Goodyear Tire & Rubber Co., Fla. App. 1964, 167 So.2d. 254, Gates & Sons, Inc. v. Brock, Fla. App. 1967, 199 So.2d. 291, and Royal v. Black & Decker Mfg. Co., Fla. App. 1967, 205 So.2d. 307. The Zabner case held that whether or not maple walnut ice cream containing a piece of walnut shell was fit for the purpose intended was a jury question. The Wisner case held that a jury should determine whether or not an underground lawn sprinkler system should have lasted longer than six years. The Gates case involved a scaffolding "snap tie" device and conflicting testimony concerning its alleged defectiveness or lack of safety. The Royal case upheld the dismissal of a complaint based on negligence, implied warranty, and strict liability in tort because there was no allegation that the power drill causing injury was unreasonably dangerous

or defective. Not one of the cases cited by respondent stands for the proposition that whether or not cigarettes proximately causing lung cancer are fit for human consumption is a jury question.

Indeed the Florida Supreme Court's advisory opinion in the case at bar explicitly declined to pass on "the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida . . . " in view of the restricted nature of the certified question (154 So.2d. at 170, App. p. 38a, emphasis added); obviously said court contemplated that violation of the implied warranty involved would not always require jury determination of the "fitness" issue.

Semantics cannot obscure the crucial conflict between the decision and opinion below and Florida's imposition of absolute and strict liability for breach of implied warranty of fitness for human consumption (Pet. pp. 22-24). Petitioners submit that death-causing cigarettes can be deemed neither fit nor reasonably fit nor wholesome nor reasonably wholesome for human consumption.

Respondent notes Judge Simpson's reliance on Community Blood Bank, Inc. v. Russell, Fla. 1967, 196 So.2d 115 as approving the case at bar for remanding for "trial on issues of fact" (B.R. p. 13). In the Community Blood Bank case the Florida Supreme Court held the district court of appeal correct in reversing the dismissal of

an implied warranty complaint and remanding the cause for trial since the complaint stated a cause of action. The citation of the Florida advisory opinion answering the certified knowledge question in the case at bar (196 So.2d at 117) did not in any way involve the Federal Court of Appeals' remand of the case at bar for a new trial on "reasonable fitness."

The Florida Supreme Court's advisory opinion specifically declined to pass on "the disposition of issues between the court and jury" as not raised by the certified question; the opinion noted, however, the absence of any assumption of risk defense (fn. 2a) and "the problem of individual reactions to ordinarily harmless substances", a problem not presented in the limited non-

adversary proceeding involved (154 So.2d at 170, 171, App. pp. 37a-38a). Suffice to state that assumption of risk was not a defense at Trial No. 2 (C.T. Vol. I pp. 18-24, Vol. VII p. 41). Moreover, respondent has conceded the total absence of any evidence at Trial No. 2 supporting the "individual reaction" defense; respondent's "Brief for Appellee" on Appeal No. 2, filed in the Court of Appeals on Sept. 9, 1966, stated as follows at p. 27:

> "There was no dvidence that Green was 'peculiarly susceptible' or 'abnormally non-resistant' to cigarettes and no expert suggested the scientific availability of such proof as to any other smoker . . ."

Once again, the essential conflict of which petitioners complain is clearly revealed. The decision and opinion below, by holding that cancer-causing cigarettes

may be fit for human consumption although decedent did not assume such risk and was not peculiarly susceptible, emasculate Florida's absolute and strict liability for breach of the implied warranty involved.

II.

THE COURT OF APPEALS SHOULD HAVE CERTIFIED THE ENTIRE CASE AT BAR TO THE FLORIDA SUPREME COURT UNDER THE SPECIAL CIRCUMSTANCES INVOLVED.

Respondent contends that the entire case cannot be certified to the Florida Supreme Court and that no significant legal issue exists because there were "conflicting opinions among expert witnesses . . . and the jury resolved this case on its own particular

facts" (B.R. p. 16). Respondent is attempting to pull itself up by its own bootstraps since, as petitioners contended successfully prior to the en banc overruling below, respondent's expert witnesses' conflict-producing testimony to the effect that nobody knows the cause of lung cancer was an impermissible relitigation of the proximate cause issue conclusively decided by the first jury herein (Pet. pp. 33-34). More important, respondent begs the question of whether or not there was any factual liability issue for jury determination at Trial No. 2 in view of the special fact findings of the first jury (see Judge Coleman's dissenting opinion

below in which Chief Judge Brown and Judge Godbold joined, 409 F.2d at 1167, App. p. 111a) and/or in view of the lack of significant evidence presented by respondent at Trial No. 2 (see Sec. I of Reply Argument supra).

Petitioners' "Motion and Suggestion for Certification to the Supreme Court of Florida" filed shortly after the en banc decision below, (C.T. Vol. IX Doc. 18) renders it obvious that the state's highest court would resolve legal questions:

> "8.) Appellants suggest that a proper question to certify to the Florida Supreme Court is precisely the question which said Court and Judge Simpson recognize has never been before said Court . . . [391 F.2d at 111, 112, App. p. 101a, quoting from 154 So.2d at 170, see also 171, App. pp. 37a-38a.] Were the cigarettes which caused a cancer in this particular

> instance unmerchantable as a matter of law in Florida, i.e. not reasonably fit and wholesome for their general purpose?"

Paragraphs 9 and 10 of Petitioners' Motion suggested other proper questions for certification:

> "Are appellants entitled to jusgments on liability in the case at bar under Florida implied warranty law?
>
> * * *
>
> "Assuming that the Florida Supreme Court does not now seem appellants entitled to judgments on liability under Florida implied warranty law, are appellants entitled to a new trial on the liability issue of 'reasonable fitness' under Florida implied warranty law as said

Florida Supreme Court will then determine it?" 2/

Respondent's argument (B.R. p.16) that "the Florida certification Statute and Rule do not . . . contemplate that the Florida Court can decide which party should prevail on the merits" ignores or overlooks the one time when the certification procedure does so contemplate, namely, when a party should

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2/ Respondent's assertion that petitioners' "Motion and Suggestion for Certification ..." was "untimely" (B.R. p. 15) overlooks the facts that (1) the Court of Appeals did not formulate its rule requesting the Florida Supreme Court to deem itself not restricted by the language of certified questions until after the failure of the certification procedure during the first appeal in the case at bar (Pet. pp. 27 & 28) and (2) Petitioners' position that they were entitled to judgment on liability was upheld by the Court of Appeals after Trial No. 2 (391 F.2d 97, App. 66a) until the overruling by the Court en banc (409 F.2d 1166, App. p. 110a). Petitioners' "Amended Petition for Rehearing" following the en banc decision also requested full certification to the Florida Supreme Court.

prevail as a matter of law (see petitioners' first and second suggested questions for certification, supra). In any event, petitioners' third suggested question sets forth the relevant propositions of law to be decided by the Florida Supreme Court if said court should deem a new trial on reasonable fitness necessary.

Respondent's reliance (B.R. p. 15) on petitioners' statement that the case at bar "will obviously have severely limited value as precedent" is misplaced. The "Brief for Appellants Following Granting of Rehearing En Banc", p. 35, explained the statement in terms of the now-required warning on cigarette packages and the fact that Florida's unusually strict implied warranty law does "not represent the majority rule." Although the American

Tobacco Company may have new defenses in subsequent cigarette-cancer cases as well as the benefit of implied warranty law more "liberal" to manufacturers in other states, Florida's implied warranty law is of utmost importance to Florida and basic implied warranty law established in the case at bar will govern Floridians regardless of additional law to be formulated concerning the "Caution" warning, addiction-response, etc. As stated in Chief Judge Brown's dissenting opinion in which Judges Coleman and Godbold joined (409 F.2d at 1169, App. p. 119a, .. emphasis added), "Florida has a great stake in fashioning the products liability standards as a sanction to a strong judicial policy of protecting Floridians from the conse-

quences" of cancer-producing cigarettes.

Respondent's Brief cites three cases (B.R. p. 15) in which the Court of Appeals refused to invoke the Florida certification procedure, namely, Motor Vehicle Cas.Co. v. Atlantic National Ins. Co., 5th Cir. 1967, 374 F.2d 601, Hamilton v. Maryland Cas. Co., 5th Cir. 1966, 368 F.2d 768, and Greer v. Associated Indem. Corp., 5th Cir. 1967, 371 F.2d 29. The salient point is that Greer involved a legal issue where there was "simply no room for doubt" as the court "read the Erie signal loud and clear with no need for amplification" (371 F.2d at 30), Hamilton dealt with a "simple" question, (368 F.2d at 769), and the Motor Vehicle Cas. Co. case posed a legal question insufficiently "intricate" or "repetitive" for certification (374 F.2d at 602) . All

three opinions were unanimous. Moreover, all three were written by the same Chief Judge Brown who dissented vociferously from the en banc opinion below in the case at bar, and in Hamilton and Greer Judge Godbold was a member of the unanimous panel, the same Judge Godbold who joined in Chief Judge Brown's dissenting opinion in the case at bar (409 F.2d at 1168, App. p. 116a).

In United Services Life Insurance Co. v. Delaney, 5th Circ. 1964, 328 F.2d 483, cert. den. 377 U.S. 935, 84 S.Ct. 1335, 12 L.Ed.2d 298, the court stayed an appeal involving the construction of insurance contracts under ambiguous Texas decisions pending state determination of decisive state law questions; as stated in Judge Brown's concurring opinion at 485, "When nine Judges . . . state they cannot

agree what controlling law is, I do not think the case can any longer be described as 'easy' or 'simple'". In the case at bar, not one of the Court of Appeals' numerous opinions concerning Florida implied warranty law has ever been unanimous (409 F.2d at 1170, App. p. 119a, fn. 13).

In Martinez v. Rodriguez, 5th Cir. 1969, 410 F.2d 729, the panel consisted of Chief Judge Brown and Judges Coleman and Simpson. Chief Judge Brown's opinion for the court stated as follows:

> "Once again we witness the effectiveness--both substantive and administrative-- of Florida's remarkably helpful certification procedure by which the Florida Supreme Court determines for us the controlling question of Florida law . . .
>
> "We would be remiss if we did not once again seize the opportunity to extol the virtues of the certification procedure . . . No matter how

many Federal Judges, trial, appellate, three-Judge panel, or the full panoply of the court en banc, any decision would have been an Erie-guess . . .

"There are, to be sure, purists who somehow feel that a struggle of uncertainty leading even to the likelihood of an erroneous but speedy result is better than the slight time it takes to get an authoritative answer. But so long as Florida is with us and has this responsive mechanism that not only lights our lights but keeps us straight at the same*time, this tribunal is grateful for the substitution of certainty for the sometimes scholastic, always uncertain, exploration into what the local Judges would say the local law is.

"With dispatch and positiveness Florida answers the Florida question. What more could one want?"

(410 F.2d at 430-*431, emphasis added).

Petitioners want no more and respectfully submit that they are entitled to no less either.

III.

THE DECISION BELOW VIOLATES PLAINTIFFS' RIGHT TO A FULL AND FAIR JURY TRIAL UNDER THE SEVENTH AMENDMENT.

Respondent's Brief (B.R. p. 17) relies on Judge Simpson's conclusion that plaintiffs' expert witnesses invited defendant's expert witness testimony to the effect that no-one knows the cause of lung cancer. Once again semantics confuse the issue. Plaintiffs' expert evidence established a causal link between cigarette smoking and lung cancer in about 10% of heavy smokers, a causal link in the legal sense, whereas defendant's experts not only testified that the "basic cause"

of cancer is unknown (a medical opinion) but also that no causal link whatsoever between smoking and lung cancer has been proven (Pet. p. 13 with citations to the Certified Transcript). Petitioners contend that Trial No. 2 could not and did not meet the requirements of the Seventh Amendment in view of defendant's expert "testimony categorically contradictory to that which had already been found as a fact" by the jury at Trial No. 1, i.e. that Green Sr.'s fatal lung cancer was proximately caused by defendant's cigarettes (409 F.2d at 104, App. p. 83a).

Petitioners submit that the significant errors committed during Trial No. 2 can be dismissed as "minor matters" (B.R. p. 17) only if, as petitioners, Chief Judge Brown and Judges Coleman and

Godbold contend, petitioners are now entitled to judgments on liability as a matter of law.

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for a Writ of Certiorari, it is respectfully submitted that Certiorari should be granted and the decision below reversed.

Respectfully submitted,

By _____

IRMA ROBBINS FEDER
and
LAWRENCE V. HASTINGS
312 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing Petitioners' Reply Brief was served on Respondent by mailing a copy thereof in a duly addressed envelope to A. LEE BRADFORD, ESQ., Dixon, Bradford, Williams, McKay & Kimbrell, 101 E. Flagler St., Miami, Florida 33131, to JANET C. BROWN, ESQ., Chadbourne, Park, Whiteside & Wolff, 25 Broadway, New York, N.Y. 10004, and to ABE KRASH, ESQ., 1229 19th St., N.W., Washington, D.C. 20006, Counsel for Respondent, this 12th day of February, 1970.

Irma Robbins Feder